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No. 466

In the Supreme Court of the United States

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OCTOBER TERM, 1969

ST. HELENA PARISH SCHOOL BOARD, ET AL, IBERVILLE PARISH SCHOOL BOARD, ET AL, POINTE COUPEE PARISH SCHOOL BOARD, ET AL, LIVINGSTON PARISH SCHOOL BOARD, ET AL, WEST BATON ROUGE PARISH SCHOOL BOARD, ET AL, WEST FELICIANA PARISH SCHOOL BOARD, ET AL, EAST FELICIANA PARISH SCHOOL BOARD, ET AL, ASCENSION PARISH SCHOOL BOARD, ET AL, JEFFERSON DAVIS PARISH SCHOOL BOARD, ET AL, LAFAYETTE PARISH SCHOOL BOARD, ET AL, ST. LANDRY PARISH SCHOOL BOARD, ET AL, RAPIDES PARISH SCHOOL BOARD, ET AL, EVANGELINE PARISH SCHOOL BOARD, ET AL, NATCHITOCHES PARISH SCHOOL BOARD, ET AL, CADDO PARISH SCHOOL BOARD, ET AL, ACADIA PARISH SCHOOL BOARD, ET AL, IBERIA PARISH SCHOOL BOARD, ET AL, JACKSON PARISH SCHOOL BOARD, ET AL, CITY OF MONROE SCHOOL BOARD, ET AL, CLAIBORNE PARISH SCHOOL BOARD, ET AL, ST. MARTIN PARISH SCHOOL BOARD, ET AL, MADISON PARISH SCHOOL BOARD, ET AL, ST. MARY PARISH SCHOOL BOARD, ET AL, CONCORDIA PARISH SCHOOL BOARD, ET AL, VERMILION PARISH SCHOOL BOARD, ET AL, LINCOLN PARISH SCHOOL BOARD, ET AL, RICHLAND PARISH SCHOOL BOARD, ET AL, OUACHITA PARISH SCHOOL BOARD, ET AL, BIENVILLE PARISH SCHOOL BOARD, ET AL, GRANT PARISH SCHOOL BOARD, ET AL, DE SOTO PARISH SCHOOL BOARD, ET AL, AVOYELLES PARISH SCHOOL BOARD, ET AL, EAST CARROLL PARISH SCHOOL BOARD, ET AL, WINN PARISH SCHOOL BOARD, ET AL, UNION PARISH SCHOOL BOARD, ET AL, WEST CARROLL PARISH SCHOOL BOARD, ET AL, MOREHOUSE PARISH SCHOOL BOARD, ET AL, CATAHOULA PARISH SCHOOL BOARD, ET AL, SABINE PARISH SCHOOL BOARD, ET AL, TANGIPAHOA PARISH SCHOOL BOARD, ET AL, LAKE CHARLES SCHOOL BOARD, ET AL, BOSSIER PARISH SCHOOL BOARD, ET AL, CALCASIEU PARISH SCHOOL BOARD, ET AL, WEBSTER PARISH SCHOOL BOARD, ET AL,

v. **Petitioners,**

VARIOUS NAMED PLAINTIFFS AND THE UNITED STATES GOVERNMENT, INTERVENOR,

Respondents.

(ALL CONSOLIDATED IN THE COURT BELOW)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Ap-

peals for the Fifth Circuit entered in the above cases on May 28, 1969.

CITATIONS TO OPINIONS BELOW

The opinion and decree of the United States District Courts for the Western District of Louisiana is printed in appendix A at page 69. The opinion and decree of the United States District Court for the Eastern District of Louisiana is printed at page 82 of Appendix B; the opinion of the Circuit Court of Appeals as printed in appendix C hereof at page 95.

STATEMENT AS TO RECORD

These cases were consolidated and expedited in the court below on the original records. Consequently, there are no printed records. The court below remanded the records to the district courts. The various district court clerks are forwarding the original records as considered by the court below under separate cover.

JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit was rendered on May 28, 1969. The jurisdiction of this court is invoked under the provisions of 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

I-A. Do "freedom of choice" programs which permit an unfettered choice of schools by all students accompanied by faculty desegregation satisfy the constitutional imperatives of the Fourteenth Amendment to the Constitution of the United States of America?

B. The true substance and purpose of Brown I and II.

II-A. Do "freedom of choice" programs under-

taken by local school boards accompanied by faculty desegregation provide the most effective constitutional method of dismantling the dual school system?

B. Progress made under Freedom of Choice.

C. Prospects for future progress.

D. Damage inflicted by immediate, massive, forced intergration.

1. Traumatic racial balancing would deter Negro Progress.
2. Rural communities are sure to suffer.

E. The District Court Opinion meets the imperative of *Green*.

F. Increasing faculty integration will enable Freedom of Choice to eliminate the dual school system.

III-A. Do alternative plans to freedom of choice require the bussing of students in contravention of the Civil Rights Act of 1964.

B. The HEW Plans

C. Clarification of National Policy

STATUTES INVOLVED

Statutory and constitutional provisions involved in this case include the following: the Fourteenth Amendment to the Constitution of the United States of America; Civil Rights Act of 1964, Title IV, Section 401(b); Title IV, Section 407 (a) (2).

STATEMENT OF THE CASE

These are a series of cases involving thirty-six parish and two city school systems situated in both the eastern and western judicial districts in Louisiana. In the Fifth Circuit Court of Appeals twenty-nine of the districts were appellees in appeals from an *en banc* decision of the District Court for the Western District

of Louisiana which hold that the "freedom of choice" desegregation programs of the systems involved satisfied the provisions of the uniform decree in *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966) (hereinafter, Jefferson I), *aff'd* with modications on rehearing *en banc*, 380 F.2d 385 (5th Cir.) (hereinafter, Jefferson II), to which these systems were subject. Eight of the parishes were appellees in appeals from a decree of the District Court for the Eastern District of Louisiana. See____F. Supp.____ (E.D. La. 1969). The Tangipahoa Parish School Board was an appellant from a decree entered by an Eastern District Court ordering it to scrap its *Jefferson* decree freedom of choice program and replace it "by adoption of geographic zones, or pairing of classes, or both." All of these cases were consolidated, argued and submitted April 21, 1969. The District Court for the Western District has now applied the circuit court mandate to five additional parish school boards who are also petitioners herein.

The opinion of the Court of Appeals was rendered on May 28, 1969. All except the Tangipahoa Parish case (No. 27,391) were reversed and remanded; the Tangipahoa case was affirmed. Remand instructions included, *inter alia:*

> "(b) No later than thirty days from the date of the mandate each school board shall submit to the district court a proposed new plan for its school district to be effective with the commencement of the 1969-70 school term. Provided, however, if the district

court desires to require a uniform type of plan, or a uniform approach to the formulation of plans, or issue instructions to the boards of methods that it will or will not consider, or other appropriate instructions, it shall enter its order to that effect within ten days of the date of the mandate. If the district court enters such an order the maximum time for filing plans shall be thirty days from the date of such order."

* * * *

"(d) New plans for all districts effective for the beginning of the 1969-70 school term shall be completed and approved by the district courts no later than July 25, 1969."

REASONS FOR GRANTING THE WRIT

I-A. The "freedom of choice" programs under Jefferson II which permit an unfettered choice of schools by all students accompanied by faculty desegregation satisfies the constitutional imperatives of the Fourteenth Amendment to the Constitution of the United States of America.

In the turmoil of controversy emanating from the decisions of this and the Fifth Circuit Court of Appeals on the racial and educational problems of this country it might be well, albeit in the eleventh hour, to revisit the constitutional provisions that gave birth to these judicial fiats. The pertinent clauses in the amendment which provide the foundation to these opinions read in part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The historic *Brown* decision of 1954[1] held laws promoting school segregation among the races to be violative of the "Equal Protection" clause of the Fourteenth Amendment. Separate but equal was no longer a valid recipe for educational systems; the constitutional imperative commanded one system equally accessible to all of our nation's citizens. One scrutinizes in vain for any word, phrase or clue or hint that compulsory integration calculated to achieve racial balances in each school and district was the touchstone of this constitutional declaration. If such it was, it was cunningly concealed from all except those privy to the nethermost depths of the jurists' minds. See also, *Brown v. Board of Education*, 349 U.S. 294 (1955); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Goss v. Board of Education of Knoxville*, 373 U.S. 783 (1963).[2] And

[1] Brown v. Board of Education, 347 U.S. 483 (1954)

[2] No one else gleaned mandatory placements to achieve racial balance from the measured tones of *Brown I*. Note the interpretations of the circuits: *Springfield School Committee v. Barksdale*, 348 F.2d 261 (1st Cir. 1965); *Taylor v. Board of Education of New Rochelle*, 294 F.2d 36 (2d. Cir. 1961); *Evans vs. Ennis*, 281 F.2d 385 (3d Cir. 1960); *Bradley v. School Board of City of Richmond*, 345 F.2d 310 (4th Cir. 1965); *Kelly v. Board of Education of Nashville*, 270 F.2d 209 (6th Cir. 1964); *Clark v. Board of Education of Little Rock*, No. 18, 360 F.2d____(8th Cir.____)

so these interpretations were allowed to mature, encouraged to bear fruit in decision after decision as one after another state statute contrived to breathe life under another name into the dual school system was crushed under the driving force of the judicial assault.

When the riots of the cities in the early 1960's traumatized the nation, questions of racial balancing in all segments of American life again gained the attention of the people. They were part and parcel of Negro demands which were often the products of frustration and impatience. But to all except the very few the injunctives of the Fourteenth Amendment required an end of discriminatory laws which served to resuscitate the dual, separate but equal, school system.

The Civil Rights Act of 1964 was the most far-reaching congressional action in its long history. It effectively summarized the mood of Congress and the people and hammered out a systematic set of laws to end legal segregation in all walks of public life. To borrow the oft-quoted phrase of Winston Churchill, if not the beginning of the end of public segregation, it was certainly the end of the beginning. Let's look at congressional thinking:

> "'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance. (Title IV, Section 401(b)). ". . . provided that nothing herein

> shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. (Title IV, Section 407(a)).

If Congress speaks for the nation, and if not it, then who, the Fourteenth Amendment properly interpreted and applied sounded the death knell of segregation. It did not herald the beginning of compulsory integration.

But the congressional sentiments here reproduced were not a rebuttal to anything this court or its subsidiaries had proclaimed. The harmony of this view with the august declarations of the federal courts are immediately apparent if one but reads the jurisprudence. The replacement of compulsory separatism by a freedom of association in all walks of public life represents in every sense of the word the flowering of a democratic society.

This is precisely what Congress thought the Civil Rights Act of 1964 meant. Senator Humphrey, the floor leader of the bill, said in part when explaining the prohibition against contriving compulsory racial balance:

> "This addition seeks simply to preclude an inference that the title confers new authority to deal with 'racial imbalance' in schools, and should

serve to soothe fears that Title IV might be read to empower the Federal Government to order the bussing of children around a city in order to achieve a certain racial balance or mix in schools." See 1964 *Congressional Record* Senate at page 12715.

Which brings us to *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966) (*Jefferson I*) adopted on rehearing *en banc* in 1967 and reported in 380 F.2d at 385 (*Jefferson II*). For the first time since *Brown I* the Fourteenth Amendment came to be construed as something quite different. There was nothing especially subtle about Judge Wisdom's language and the time has long passed when its effects can be treated with subtlety. Racial balance is to be contrived by school boards, compulsory integration is to be ruthlessly pursued so that whites and Negroes in proper proportions will find themselves in the same schools.

Side by side with the pronouncements of this court, the language of *Jefferson I* and *II* was revolutionary. The language was blunt, the distinction cataclysmic. If the will of the people, white and black, as expressed in congressional acts, was given even the most cursory treatment, it was nowhere evident. The ruthlessly imposed restriction on one's freedom not to associate became the twin of the much despised restriction on man's right to associate. Predictably, the victim of the assault was freedom itself.

The force of this explains why we termed it "cataclysmic." It is one thing to deny a man the right to wed

the woman of his choice; how much has his freedom been expanded and his free spirit nourished when he is told whom he must wed? If this was freedom, it is not too much to say that the *Jefferson* courts gave it a novel dimension foreign to its advocates through the ages. And if this new dimension to freedom is different from the tyranny of Plato's Philosopher King, the distinction is too subtle to express. The impact of the language smacked of the certainty of a Nietzsche or a Pareto, and the simplicity and verve with which the negative imperative of nondiscrimination under the Fourteenth Amendment was clad in the shiny new clothes of mandatory proportional association bridged centuries in which great minds explored the essential democratic problem of how to achieve equal opportunity and justice within the tolerable limits of man's freedom.

Judge Godbold in his dissent was prophetic:

> "The United States reads the language of the majority in this vital area (compulsory achievement of racial balance) as mere dictum. In brief on rehearing the government says; 'The appellees, in petitioning for rehearing, asserted that the decision of the panel held that the Constitution imposes an absolute duty to achieve a racial mixing of students so as to eliminate a disproportionate concentration of Negroes in certain schools within a system. Once this proposition is asserted, the appellees have no difficulty in disparaging the opinion as being inconsistent with prior holdings of the Fifth Circuit. It is true that the court indicated its concern that educational opportunities on an

equal basis be furnished to all, and the opinion does suggest in a footnote that elimination of the all-Negro school makes this objective easier to obtain. *But the appellees misread the opinion when they claim that this is the holding of the Court.*' I wish that I could read the majority as saying no more than that disproportionate racial concentration of students is evidentiary of whether a freedom of choice system is truly free, or share with confidence the view that the teeth of the original opinion are extracted by paragraph 5 of the en banc opinion. I am not able to do so. If the language of mandatory mixing is indeed a mere aside we shall all await with interest to see whether the courts are the prisoners of their own slogans and the dictum of today is to be asserted as the law of tomorrow." (emphasis Judge Godbold's).

Someone has wisely said that an idea expressed becomes an opinion and an opinion defended becomes a conviction. Time and again we have seen reason become the prisoner of prejudice and emotion. Man's capacity for self-deception appears at times to be limitless. In *Jefferson*, just as Judge Godbold advised, the wheel of logic came full circle. There were ambiguities of language, differing degrees of emphasis, but the germ of rearranging educational systems to achieve racial balances was clearly there. If *Jefferson* was to be passed off as the progeny of *Brown I* and *II*, one would be compelled to produce a birth certificate of legitimacy to obtain general acceptance.

How this court interpreted *Jefferson I* and *II* we have no way of fathoming. The essential meaning

of the *Jefferson* opinions and decree were masked by its approval of "freedom of choice" as an acceptable means of fabricating a unitary school system. Left unwritten were the consequences of *Jefferson* if freedom of choice did not achieve swift racial balance. Deftly ignored was how a color-blind school system could be constructed by assigning students on the basis of color, if racial balance were really the constitutional Holy Grail. Presumably, this court chose to postpone and perhaps avoid any problem presented by Negroes freely choosing in large numbers to remain in their neighborhood schools.

The concept of compulsory racial balancing was first expressed in *Jefferson I* in a two-to-one decision. The *en banc* panel that rendered *Jefferson II* apparently split eight to four. To insinuate its theory of a constitutional requirement to balance the races, it was compelled to overrule specifically no less than nine of its own opinions stretching over a decade. See *Jefferson II* at 388.

In 1968 this court rendered *Green vs. County Board of New Kent County, Virginia*, 391 U. S. 430, 88 Sup. Ct. 1697. It apparently approved the language utilized in the Jefferson opinions to some degree ("a plan that promises realistically to work"); nonetheless, this court was careful to use such measured phrases as "to achieve a system of determining admission to the public schools on a non-racial basis" and "to effectuate a transition to a racially non-discriminatory school system," which were borrowed from the original *Brown* decisions.

There is no profit to be derived by further dwelling on the inexorable step-by-step process by which the prohibition against a segregated school system was translated into a constitutional doctrine of forced racial balancing. This court knows the story as well as we. To the Fifth Circuit Court of Appeals the *Green* case became the green light and in *Adams, et al v. Matthews, et al.*, 403 F.2d 181 (1968); *Graves v. Walton County Board of Education*, 396 F.2d 44 (1968); *United States v. Greenwood Municipal School District*, ___ F.2d ___ (1969); *Henry v. The Clarksdale Municipal Separate School District, et al*, ___ F.2d ___ (1969); the drive toward racial balance hurtles forward at a break-neck and dizzying pace. The opinions in *Jefferson I* and *II* did not authorize these later decisions; they certainly were not children of *Green*. As in Judge Godbold's prophecy, the insinuations of Jefferson became harsh judicial dogma.

It is vital that this Court recognize the distinction between segregation in the school system and segregation in the host of other social and public pursuits. In these latter areas—restaurants, transportation facilities, hotels, amusement places, etc.—elimination of segregation has been accomplished without doing violence to the freedoms which belong to all, black and white. Freedom of association remains inviolate; the Negro may yet determine what hotel to patronize, what restaurant to frequent, what transportation facility to utilize. This area of society moves inexorably toward a color-blind state which harmonizes

an indispensable freedom to associate and develop culturally with unfettered utilization of public facilities without regard to race. Our confidence in the concepts of democracy that cement this grand country nurtures our hope and confidence that in every passing day the color of a man's skin becomes less important.

But the contrast here with the law of the Fifth Circuit in education is tragically crucial to the health of our society. When compulsory integration is promoted, when the bodies and not the spirit count, as Judge Brown is wont to say, the divergent pulls of constitutional principles become evident. Compulsory integration in a school system cannot be achieved without signaling a new importance to the color of one's skin. All of the splendid rhetoric about a school system that knows no color is semantic window dressing to a program that makes a ritual of identifying color and then placing color into some sort of pattern. In desperation we assert again to this court that a color-blind society is impossible when a school board achieving a unitary school system must begin by labeling a student white or black.

We have thus far concentrated on what we believe to be the minimum requirements of a free society. Our remarks should not be summarily dismissed as the ravings of racists. What we say here has roots in the philosophy of every freedom-minded thinker from the time of Spinoza to yesterday. We know that what we say here has meaning to this court; it does violence to none of the essential ideas expressed in recent decisions defending the basic guarantee freely to associate set

out in the First Amendment. *Williams v. Rhodes*, 89 Sup. Ct. 5 (1968); *NAACP v. Budden*, 371 U.S. 415, 83 Sup. Ct. 328; *Bates v. City of Little Rock*, 361 U.S. 516, 80 Sup. Ct. 412; *NAACP v. State of Alabama*, 357 U.S. 449, 78 Sup. Ct. 1163.

There is a limit beyond which society cannot be compelled to respond. *Bolling v. Sharp*, 347 U.S. 497, 74 S.Ct. 693 (1954) was a companion case to *Brown* and involved Washington, D. C. At that time the District of Columbia had a school superintendent prepared to make herculean efforts to achieve an integrated school system. No one questioned the sincerity of the renowned figure in education. Yet, according to a report of the United States Civil Rights Commission, a decade and a half after *Brown* 99.8% of the Negro teachers in Washington, D. C. are in predominantly Negro schools. Approximately 93% of the students in the system are Negro and attend virtually all-Negro schools. Freedom of choice is achieving at least this much.

It is time, it is past time, for this court squarely to face the issue of what the Fourteenth Amendment demands. Recent decisions of the Fifth Circuit have gone beyond *Jefferson* and even beyond *Green*. The issue has moved beyond opportunity for the Negro and into the area of freedom for white and Negro. It is not too much to say the distinction between the recent decisions of the Fifth Circuit and *Brown* are as great as the one between *Plessy v. Ferguson* and *Brown*.

For a century slavery was the rule of law in

America. Sixty years passed before *Plessy v. Ferguson* and separate but equal was demolished. In the fifteen years since *Brown*, public facilities have been desegregated. In the south candidates vie for Negro support, Negro clerks in substantial numbers have appeared in stores, Negro employees are being hired in growing numbers in America's industry. As will appear in more detail later, freedom of choice has produced significant progress in faculty and student mixing. The mood of the country has undergone a growing acceptance of this fact, and freedom of choice enjoys wide community acceptance in the south. Mixing has continued and will continue to increase at a community pace which, considering the need for community support, is of no small moment. The morality of a society moves gradually and only disaster can result from a forced and unrealistic pace. Social ethics are the product of thousands of ant-like creatures building a sandhill of morality rather than the consequence of a handful of messiahs waving their wands in the wind.

B. The true substance and purpose of Brown.

We respectfully submit that all of the demands of counsel for plaintiffs beginning with *Jefferson I*, to the present time, have either overlooked or ignored the real substance of *Brown*. We respectfully submit that it is impossible to read the *Brown* decisions without recognizing immediately that the discriminatory assignment of students to schools solely because of race, the deliberate state imposed segregation of Negro children in the schools, was only the cause of the problem which, not only the Supreme Court, but the plain-

tiffs themselves, were asking to be corrected. The real problem was the poor education that Negro children were receiving, the unequal education, that was keeping them from being able to achieve in their future life on the same equal footing as whites.

Although the Court did find that segregation is in itself harmful to the Negro children, we cannot ignore the overriding problem as stated by the Supreme Court in *Brown I*, 74 Supreme Ct. 686 at Page 691, which is quoted below:

> "In approaching this problem, we cannot turn the clock back to 1868 when the amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. *We must consider public education in the light of its full development in its present place in American life throughout the nation.* Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.
>
> *Today, education is perhaps the most important function of state and local governments.* Compulsory school attendance laws and the great expenditures for education both demonstrate *our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities,* even service in the Armed Forces. *It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to suc-*

ceed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (emphasis added)

The above statement is the real crux of the problem. This is what we are all really trying to achieve. These school boards are now desperately trying to reach this achievement without, at the same time, destroying quality public education for all.

The basic underlying issues which must be finally and clearly answered by this Court are (1) what was the real purpose and significance of *Brown I and II* and subsequent decisions of this Court and (2) what is the proper role of education in providing the solution to the race problem which exists in this Nation.

To limit the purpose and spirit of *Brown I and II* to a mere "mixing of bodies" and "empirical statistics" is to remove its very heart and soul. It must not be relegated to the mere mixing of black and white bodies in brick and wooden school buildings. It must be the beginning of the ultimate end of elevating the Negro to his true status as an American citizen with equal opportunity and full equality in all phases of our American life be it education, jobs, economics or home, cultural or social environment. This is confirmed by Mr. Justice Frankfurter in his concurring opinion in *Cooper v. Aaron*, 358 U.S. (1958), when he said:

"By working together, while sharing in a common effort, men of different minds and tempers, even if they do not reach agreement, acquire under-

standing and thereby tolerance of their differences. . . . *Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms. . . .*" (Emphasis added)

If there is any one place in the various aspects of civilized America where this ultimate end of Brown can be nurtured and brought to ultimate reality, it is in the field of education. Only here where young, dedicated, professional educators, black and white, can voluntarily work together at their chosen task of improving the minds and spirit of the very young, may race be shoved into the background. Only here do we have the constant voluntary, happy association of these young, whose prejudices may not yet have formed or whose attitudes have not yet hardened, working together to become equal citizens of the future.

We must not let impetuousness or impatience either limit the spirit of *Brown* or impede the role of education in bringing its spirit to full flower. This is the mistake made by the Court below for only under "Freedom of Choice" do we have the "Constructive use of time."

The Court below, apparently ignoring the basic underlying problem in these cases, the race problem of this Nation, and apparently tiring of having these school boards constantly brought before them, once again condemns these boards for failing to completely solve its problem (which, by the way, has not been solved anywhere in this Nation) and orders massive, immediate integration of people over whom these

boards have no control. You can lead a horse to water but you cannot make him drink. The *people*, both black and white, are no more ready for this massive, forced association in these school systems than they were in Washington, D.C. and elsewhere. There must be a better way.

The Court below may very well be shoveling the last spadeful of earth on the graves of *Brown I* and *Brown II*. It is distressing to think, after only 15 short years, that *Brown I* and *Brown II*, which were to be the judicial expression of the living spirit of our Constitution in this most vital area of human relations, may become lifeless hulks of judicial retoric with no real meaning for anyone and of absolutely no benefit to the children of future generations.

Yet, today we stand, very possibly, at the edge of the grave listening to the incantations of lesser judges who were charged with the responsibility of enlarging and brightening the spirit of our Constitution with which *Brown* was imbued. It took 60 years to quench the dark and evil spirit of *Plessy v. Ferguson*—yet in 15 short years a lack of understanding of human nature, a lack of compassion, a lack of practicality and a lack of knowledge may finally extinguish the flame of *Brown I* and *Brown II*.

It is yet not too late to balance freedom and opportunity in the area of education. The measured principles of *Brown* do so. Americans with social conscience embraced these principles and the Negro community as a whole has really asked nothing more. Forced in-

tegration and racial balancing has become tyranny and inequality by another name. We beseech this court to recognize it and reaffirm the Fourteenth Amendment as the instrument of liberty it appeared to be in *Brown*.

II-A. "Freedom of choice" with faculty desegregation is most effective method of dismantling the dual system.

The vast majority of school systems represented in the application have been under the *Jefferson type* "freedom of choice" plan for barely two years, the 1967-68 school year and the 1968-69 school year just ended. In the court below we were continually chided by attorneys for appellants that freedom of choice was a "failure." Aside from revealing writers too young to have historical perspective, the observation invited rebuttal. This system of "freedom of choice," the subject of appellants' feral onslaughts, was not a fraudulent scheme to fetter Negro development but rather a markedly courageous plan put through with the endorsement of the courts and the appellants. So, also, was faculty integration. Both programs were founded on both the hope and expectation that integration would eventually follow. No one who paused to reflect on two centuries of segregation in the south expected a racial balance to occur quickly. Labor did not quickly achieve public recognition of its right to bargain collectively. Nor did Women's Suffrage generate instant acclaim. Social habits are not abandoned quickly, custom is the foundation of society. To believe that a racial balance would occur in two years was to misunder-

stand to an incredible extent the mood of the white and black communities.

Far from being ashamed of their progress, these school boards have every right to feel proud of their accomplishments. Significant numbers of Negro children have chosen formerly all white schools; white teachers in increasing numbers are successfully making the transition to predominantly Negro schools and Negro teachers have been and are continuing in greater numbers to be shifted to predominantly white schools.

It is unfortunate, indeed tragic, that courts should judge the success of any great social experiment by numbers alone. An observer can no more evaluate the progress of freedom of choice by statistics alone than he can describe how the United States functions by reading its Constitution. Two years after the American labor movement began the Fifth Circuit would have declared it an abysmal social abortion by statistics alone without vision to see and faith to wait for it to become the most powerful organized labor force in the entire western world. Woman Suffrage was a failure two years after its beginning if judged by numbers alone. So also was Christianity. Indeed, what great social change was ever accomplished at the speed which our Court of Appeals for the Fifth Circuit now demands? The plain fact is that historically no great social movement has blossomed full blown when dependent on public acceptance in two years or even two decades. Only youth expects democracy to be swift or human freedom instantly effective. The test of freedom of

choice is not whether it has dismantled all vestiges of a dual system in its initial few hours and achieved a racial balance, but whether it is making commendable and substantial progress in that direction. This is the only standard of judgment that made sense when freedom of choice was instituted in *Jefferson*. Anyone, Judges and litigants alike, who thought more than two centuries of a state-imposed dual school system would be translated into a racially balanced system in two years of freedom of choice was beyond peradventure so socially myopic as to be disqualified forever from taking any meaningful part in the regulation of human affairs. We cannot believe that the Supreme Court of the United States meant differently in *Green* when it said:

> "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. This is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state imposed segregation. It is incumbent upon the district court to weight that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have

> real prospects for dismantling the state-imposed dual system at the earliest date,' then the plan may be said to provide effective relief. Of course, where other, more promising courses of action are open to the board, that may indicate a lack of good faith; and at least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.
>
> "We do not hold that 'freedom of choice' can have no place in such a plan. We do not hold that a 'freedom-of-choice' plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decided today is that in desegregating a dual system a plan utilizing 'freedom of choice' is not an end in itself."

"Acting in good faith" and "prospects for dismantling the state-imposed dual system at the earliest practicable date," is not the language of immediacy, certainly not the tone of uncontrolled impatience. When one talks of "prospects," one necessarily means a reasonable period of time governed by social exigencies, not tomorrow. "At the earliest practicable date" does not import the next school year, indeed, leaves room for reconciliation of social and educational imperatives. Yet, immediate integration, is the way the Fifth Circuit chose to read it, and that is the keynote of the decision we now seek to have reviewed. We do not here quarrel with *Green;* we contest in the most vigorous

manner possible, consistent with the respect any Appellate Court deserves, that the Fifth Circuit misread *Green* and used it to exact a rigorous schedule *Green* never intended to command.

Furthermore, terms such as "disestablished the dual system" and "remove the vestiges of the dual system," all of which are creatures of various panels of the Court below, and some of which have been utilized by this Court, have never been defined by the Court below or this Court. For example, when a school board attempts to determine what its school system should look like when it has "disestablished the dual system" and when it has removed the "vestiges of the dual system", where should it look for a concrete physical example of such system. May it look to other school systems in the Nation outside the "eleven states of the Confederacy and six border states" (*Jefferson I*)? If it may do so, it would find that in the 100 largest school systems in this Nation, 70% of which are outside the South, 48% of the schools in those systems are either all black or all white. The Los Angeles community school system is a good example. They have never had a dual school system so if we may reconstruct our previous dual school system so that it resembles their non-dual school system we need do far less than required by the Court below.

B. Freedom of Choice has made Substantial Progress toward the "true equality" of Brown

The social and educational progress of freedom of choice in the school districts affected by this deci-

sion has been impressive and significant. It promises genuine "prospects" for dismantling the dual school system at the earliest practicable date and without the sacrifice of quality education for both races. Let us show the Court what we mean.

Judgment by statistics borders on the ridiculous when human factors come under review. At least they demonstrate the limitations of the computer. Yet, one is not justified in criticizing progress under the freedom of choice system as unimpressive. Indeed, when one recalls the long period in which the state-imposed dual system was extant; when one considers how reluctant and frightened so many Negroes were to undertake something totally new in its first year; when one recalls the reluctance to isolate one's child with those of another race; when one understands the resolve of any parent to spare one's child the awful experience of ostracisim and hurt; the numbers of Negroes streaming into white schools becomes impressive. The second-year increase in substantially all districts is the commanding statistic because it, more than words and testimony, demonstrates the sincerity of school administrators and the splendid reception of these crossover students by other students and faculty. It shows how many Negro fears were erased by experience. It showed unequivocally that Negro fears of mistreatment had waned because they had not materialized.

But statistics must be regarded as secondary to the vast and heart-warming improvement that has demonstrably occurred in the social relations between the races. To be sure, we do not claim the elimination

of prejudice. But in this period of turbulence among the races in our congested urban centers, any improvement at any level is worthy of comment. One counsel in these proceedings introduced unposed photographs of Negro and white children playing and working together; a ray of hope out of the turbulent racial tensions that belong to our times. These photographs could have been duplicated many times over in all the districts, because in just two years youth, with its flexibility and resilience, has embraced tolerance as readily as the old embraced prejudice. The scenes reveal that in the short space of two years Negro and white children have learned together, played together and learned to understand one another. Other photographs show teachers cooperating in the solution of common problems. How would the Court have us present this statistically? Where does it all fit in the injunction about bodies and not spirit? Because we cannot, is it of no moment,, irrelevant to the grand purpose of the Fourteenth Amendment? Is this court prepared to say that?

And what of the acceptance of freedom of choice by southern communities which, five years ago, adamantly opposed any racial mixing? Compare the atmosphere in the South today with the massive resistance in Little Rock in the 1950's, Alabama, Mississippi and Louisiana of the 1960's. Have we forgotten so easily the total shredding of our social fabric when any mixing occurred? Can this Court ever recall a period in past or recent history when public acceptance of racial mixing in the schools has attained more public support than in the last two years under freedom of choice?

Compare progress from 1954 to 1966 with the past two years. Read the affidavits in certain of these records as leading figures in the communities describe progress in human terms. Could they have put their names to such affidavits three years ago? Are these declarations of progress irrelevant because we cannot translate them into statistics, because they do not fit readily into charts and graphs?

School progress in inter-racial relations cannot be divorced from racial progress in other areas of social activity. Society is but a school system writ large. Here progress is readily viewable, solid achievements have been realized. Nine Negroes now serve on seven school boards, ranging from urban centers like New Orleans to more rural areas in North Louisiana. We now have one Negro mayor, five Negro aldermen and three Negro councilmen, and a Negro member of the Louisiana House of Representatives. A new Negro judge sits in New Orleans. One of the Negro councilmen in the Baton Rouge area could not have been elected but for the vote of some 5,000 white voters. Compare this with Louisiana a decade or even five years ago. This, of course, omits the thousands of Negroes working as Sheriff's deputies, policemen and other employees in both public and private areas. Statistically, the Fifth Circuit might well shout "failure" but those vitally interested in community race relations do not so term it.

C. Prospects for future progress under "Freedom of Choice"

All in all, we respectfully submit that considerable

progress has been made under freedom of choice in the short time that these school boards have had to put it into effect. We submit that now that freedom of choice has brought about a better understanding and awareness of the real problems that considerably more progress can be made in the future. As was pointed out in the affidavit of Mr. Connell, of the East Feliciana Parish School Board,

> ". . . The East Feliciana Parish School system and the persons who comprise the educational personnel force for that system on the policy making, administrative and instructional levels are now better equipped and prepared to assist in solving East Feliciana Parish's problems of race and to contribute, at least in part, to the solution of the problem of race in the United States. . . ."
>
> ". . . The East Feliciana Parish School system is now engaged in a program which can correct these previously existing deficiencies and improve the educational opportunities for all the children in the East Feliciana Parish School system, particularly the Negro children, and is presently moving forward in correcting such deficiencies and improving such opportunities. . . ."

This improvement and progress is reflected in the affidavits of the affiants in each of these cases and in the depositions of the Superintendents of these various school systems.

In addition to the above, each of these school boards has implemented various programs designed to carry out the real thrust of *Brown*, that is, to improve

the education and educational opportunities of all children in the system but particularly the Negro children. They have installed remedial reading programs for the culturally disadvantaged children, in-service training programs for the upgrading of faculty, health and nutrition programs for the culturaly disadvantaged, and kindergarten programs to give the disadvantaged child the benefit of preschool training to make up for the lack of a proper home environment. These programs will vary from school system to school system in approach and method with some trying new approaches that perhaps another system has not yet discovered. For example, the Monroe City School Board is participating with North-East Louisiana State College in their Laboratory Institute to Facilitate Teaching, (Lift). The purpose of this program is to train teachers in how to upgrade educational programs for disadvantaged youth.

Superintendent Distefano of the Iberville Parish School system has traveled all over the country observing school systems and talking to educators who have been confronted with some of these problems in an effort to find proper educational solutions. Superintendent Distefano, members of his school board, and the writer consulted with Dr. Harold Gores of the Educational Facilities Laboratory, Inc. of New York City for the purpose of getting advice and soliciting outside private funds for research into possible solutions for this problem.

As a result of this research by this Superinten-

dent, voluntarily and on his own, the Iberville Parish School system is in the process of having architects prepare plans and specifications for one single high school to serve all of the children of the Town of Plaquemine in Iberville Parish, both white and Negro. By constructing one larger school with the latest equipment and facilities, and improved curriculum, different methods of teaching (for example, by the use of team teaching). Superintendent Distefano hopes to lessen the impact of the great amount of integration that will result from the construction of this single school to serve all children so that he may maintain the integrity of a public education system for all the children in his area.

Furthermore, Superintendent Lutz and his school board in West Baton Rouge Parish had proposed a bond issue to the people of West Baton Rouge Parish for the construction, also, of a single new high school to serve all the children of West Baton Rouge Parish. Their approach would have been similar to that of Superintendent Distefano in Iberville Parish in trying to provide a facility that will attract parents of both races regardless of the amount of integration it will bring. (It is worth noting that here again is one place where numbers are relevant. The school population in West Baton Rouge Parish is approximately 50% Negro and in Iberville Parish, approximately 60% Negro. Here numbers are relevant because they compound the difficulty caused by the basic problem —the race problem.) This kind of planning is a step in the right direction—a better school, a better school

curriculum and a better education for all children, black and white alike. However, because of the decision of the Court below requiring massive, immediate, forced integration, which was rendered only five days before the bond issue election, the proposal was defeated and the new facility cannot be built.

This new awareness of responsibilities, just now beginning to flower, can make public education the vehicle by which our national life expands to new heights. With it, we can realize the true national purpose of our democratic society. Through this new awareness—this new spirit—the lives given from 1861 through 1864 will not have been wasted.

We urge the court to give these dedicated educators, these sincere citizens, the new, young teachers time—time to work, to explore, to experiment—time to find a *right* solution to a national problem which has existed since the first slave ship touched our shores with its first cargo of man's indignity to man.

Do not heed the impatient demands of the vocal few. Do not, in the name of speed and cold statistical numbers, run the risk of loosing the worst in the human nature of individuals—individuals whom these Boards and educators have no power to control—and thereby lose the war before the battle is even begun. Give them time—give them encouragement that they, with their knowledge and experience in working with young people, can build leaders of the future who will not be faced with the burden of this problem.

D. Damage inflicted by immediate massive forced integration.

1. TRAUMATIC RACIAL BALANCING WOULD DETER NEGRO PROGRESS

"It is not the spirit but the bodies that count" is a neat twist of language but lousy sociology. Further, it takes the very heart out of education. In all the evidence adduced in these proceedings, there is not one shred of testimony recommending a traumatic assignment of students to achieve racial balancing. No educator has been produced by plaintiffs who will recommend such a course. To the contrary, there is ample testimony from educators which stresses that a solid educational foundation must be laid before the bulk of the Negro population will care to exercise their option to enter a school with white students. It is tragic that numbers on a chart should sweep aside the expertise of these educators. It is uncharitable to assume that they are motivated by other than a devoted concern to preserve intact a sound system for all.

There is a dramatic gap in achievement levels between whites and Negroes in all of the districts. This was inevitable in segregated schools and a segregated culture. The evidence shows that herculean efforts have been undertaken to erase this gap through special teachers' training programs, remedial reading courses for the culturally disadvantaged children, in-service training programs for the upgrading of faculty, health and nutrition programs for deprived children and kindergarten programs to introduce culturally deficient

children into a pre-school training program. We regret that this gap exists. But regrets do not alter facts and must be given relevance if equal educational opportunity rather than revenge are our ultimate goals. Only those in the vortex of school administrations are aware of the countless hours in work and planning which have been expended in organizing and conducting these programs and in searching for other more effective and feasible solutions. These educational foundations must precede, not follow, substantial integration.

Pairing and forced mixing would be "so traumatic that it (would) tear out a school system root and branch at the same time the dual system is being eliminated." So declared the three local Western District Judges closely attuned to the education systems involved. This was confirmed by the testimony of Dr. Fred Vescolani of Michigan State University, a nationally known educator. To this educator, freedom of choice is the only realistic method of achieving a unitary school system consistent with the maintenance of a sound educational system. Affidavits of superintendents in the record support this view. To such testimony plaintiffs exhibit disdain. Dr. Vescolani was not even cross-examined. To plaintiffs their pleasure seems the only consideration. Unfortunately, these young men are not educators; they know nothing of the bundle of problems both educational and otherwise with which our local educators daily grapple. They can be comfortable with a wrecked school system. They do not have to pick up the pieces.

In 1954 in *Brown I* this court borrowed heavily from opinions and writings of prominent sociologists to prove that state-imposed segregation destroyed the pride and dignity of a Negro, converted him into a second-class citizen, and frustrated his development into a productive and effective citizen. The recognition that constitutional principles are inextricably tied to social results was criticized sharply by some who opposed any desegregation, but the great masses realized that the sociological results of segregation had constitutional relevance. Laws which ignore the human factors are poor standards for social regulation.

But any court which gave moment to the sociological impact of segregation on the Negro must be equally prepared to pause and consider the sociological implications of forceably integrating a Negro not yet mentally prepared to compete on the white educational level. Has this court truly considered the frustration, the sickening feeling of inferiority, the enervating despair and the tragic loss of hope when the unprepared Negro is summarily and mercilessly cast into the lion's den of the better prepared whites? These superintendents have, and in this affidavit they make a desperate plea for time to correct this situation. After all, frustration is frustration whatever its source.

Perhaps this court is correct when it states that constitutional principles do not depend on public response. A Constitution must be the salvation of the helpless; the strong need no help. But if desegregation is designed as an instrument of salvation for the Negro, it should be geared to his development not in-

different to his frustrations. A system which thrusts the Negro beyond the pace representing his capacity would be as cruel as the state-imposed system of segregation which it would replace. This is the danger of statistics. Negroes are not numbers, and a pairing here or a changed bus route there cannot avoid displacing Negro students wholly unprepared for this traumatic educational experience. It takes from Negro parents, from educators, from pupils themselves the ultimate decision of when they are ready to grapple with this momentous change. The Negroes themselves know this, and plaintiffs can point to no real Negro support in their demands for immediate racial balancing. Indeed, in most of these suits there are no Negro plaintiffs left —only lawyers, and most of them from without these school systems.

Dramatic intermixing on a forced basis could very well deter Negro development for a decade or even a generation. Negro dropouts are sure to increase dramatically; educational frustrations may find tragic antisocial outlets. Race relations are sure to suffer and progress already made will be erased. In social relations too much can be as harmful as too little. Surely, the Court here should listen to experts, give weight to these possibilities and perils. The matter is too important, the consequences too cataclysmic to allow a decision based on statistics and arithmetic. We are not yet ready to replace judges with computers.

2. RURAL COMMUNITIES ARE SURE TO SUFFER

Forced integration at an unnatural pace is certain

to have a traumatic impact in community areas related to education. Prejudice is a sordid fact of life, and no one on this court will contend that forced mixing and forced racial balancing will eliminate it. Anti-semitism, after all, has persisted for two thousand years and still runs deep in community thought in some other areas of our nation. Not only would a forced racial balancing be permanently destructive of the Negro, it will virtually destroy large areas of the rural south.

It gives these writers no pleasure to use the venal nature of man to fortify an argument in favor of freedom of choice. But law can never move far beyond man's nature nor in a free society should it. Man's nature must always be assessed, and no matter how much basic goodness goes into the fabrication of a program, it is results that ultimately count. Enough evidence is in to show that wherever forced mixing is undertaken an exodus of white families begins. This occurred in Washington, D.C., where white citizens gave vent to their feelings with their feet. Today, Washington, D.C., is a segregated society where lawmakers by day make laws against discrimination and at night return to their segregated facilities. There is less integration in Washington, D.C., than in many of these districts. These are statistics the Court could well afford to notice.

This Court is well aware that many rural southern areas are predominantly Negro in racial composition. Pairing and other methods of forced assignment which move toward racial balance will create schools with a heavy majority of Negroes and a minority of whites.

This is the one situation which does not long endure, North or South. In numerous dramatic situations white minorities have fled to escape minority status in the school system. This Court can ignore it, but it is a fact which cannot be contested.

This exodus is all the more serious because it is the more affluent and middle class whites who lead the migration. It is they who can afford the sacrifice. Doctors and lawyers leave and inevitably white teachers find employment in the neighboring urban centers where compensation is usually better. Rural communities are robbed of their talent and leadership; those remaining are bitter at their inability to follow. Unsupported by whites, the school systems deteriorate. Bond issues designed to build schools, raise salaries and keep pace educationally are voted down. Property assessments drop. Jobs become scarce. De facto segregation becomes as fixed as state-imposed segregation and the distinction between the two becomes too subtle for significance. Such a situation destroys rural communities in a multitude of ways. Factories and plants searching for places to locate avoid communities where Negroes predominate in all the schools. They avoid communities where white affluent citizens have fled, where bond programs for schools have failed. In short, they avoid places where they are unable to recruit and maintain talented managers and executive personnel.

This is not a fright fantasy, the shepherd crying wolf when his sheep are safe. Enough returns are in to confirm the picture painted above and predict these disasters in virtually every rural community. Since the

decision of the Fifth Circuit Court of Appeals, bond issues throughout Louisiana have failed. Observers feel that most of these would have passed if freedom of choice had been affirmed. Fear, always a predictable commodity in the market of race relations, permeates the atmosphere and has dealt school programs serious setbacks. The construction of new schools without the taint of former racial occupancy has been deterred. All agree that new schools are one method by which freedom of choice could be accelerated into a program that could work realistically and soon. When Congress and the Courts removed all discrimination from the housing market, White America demonstrated forcefully against forced integration. It does no good to moralize about it; the father who leaves the city in which he was reared, his job and his friends, expresses himself as directly as he is able. To score him as "uncharitable" or to devise rules that would remove from him his freedom of association is as useless as to criticize politicians for trying to please their constituencies.

Can white exodus and white indifference to public education which will follow forced integration achieve the goals of the Fourteenth Amendment? Will the Negro be served? If not, the denial of freedom of choice becomes less than useless; it begins to smack of punishment, takes on the odor of vengeance. We plead with this Court to pause and consider the consequences of what the Fifth Circuit decision does. We ask for a chance to make freedom of choice work before our communities are destroyed. If we are wrong and freedom of choice does not everywhere prove effective, what

other than a few years have we lost? If we are correct, a social catastrophe too vast to retrieve will have been visited. The stakes are too high to bet recklessly.

E. The District Court Opinion meets the imperatives of Green

All that we have said the District Court Judges well knew when they upheld the freedom-of-choice system. These are able men, products of our communities. At least one, Judge Dawkins, was president of a school board. They sat *en banc*, and after considering all aspects of the situation, said:

> "The question for decision is whether under all the circumstances here present the 'freedom of choice plans' . . . constitute adequate compliance with the board's responsibility 'to achieve a non-racial basis' . . . *Brown v. Board of Education*, 349 U.S. 294, 300-301 (Brown II) . . . ."

They discussed their duties under *Adams v. Matthews, et al*, 403 F.2d 181 (1968) and particularly as set forth by the United States Supreme Court in *Green*.

The court set out its findings of fact in terse fashion:

> "(1) The School Boards are acting in good faith.
>
> "2. The Jefferson decree under which they have been operating since the fall of 1967 has *real prospects* for dismantling the dual system "At the earliest practicable date," especially in light of the substantial assignments of faculty members to schools of the opposite race, which naturally encourage students of both races to transfer. (emphasis supplied)

"3. The documentary evidence in each case speaks for itself and is incorporated herein by reference."

The opinion followed:

" '*Green* involved a school system with only two schools. There, it was held that under all the circumstances the freedom of choice plan was not working. Every plan, *Green* says, must finally check out in tests of *practicality, promise and realism. Green* does not burden any school system with a demand for action *so traumatic that it tears out a school system root and branch* at the same time the dual system is being eliminated. Considering conditions which existed for nearly a century following emancipation, real progress has been made with Jefferson freedom of choice and its decree permitting such freedom (most recently approved in Green) if it is working. A sense of security and happiness on the part of a pupil is a tremendous asset in his learning process. Prior to Jefferson, (1967), integration was practically nil. In 1967 the Jefferson decree was entered. Approximately 4.986 Negro students attended previously all white schools as a result. In 1968 there were 7,550 attending. In 1967 there were approximately 300 teachers in schools of the opposite race. In 1968 there were approximately 1,000. The so called "all white" schools are almost a thing of the past. We still have so called "Negro" schools but almost all have white faculty members. . . . This progress deserves praise. It is manifestly impossible for any plan to "promise" realistically to work "now", if "now" means "tomorrow". Since "now" cannot mean "tomorrow" then it must mean something in the sense of time which can be equated

with the connotations of other expressions so often used in *Green*, such as practicable" and "realistic". Freedom of choice is working in most of our parishes. Some think the progress is too slow—the government calls it a "glacial movement". Many others think it is going too fast. *But any fair minded man will agree that in most parishes there is progress. The direction is clear. The goal is clear. The direction is right; the goal will be reached. It is no more a problem than of maintaining a steady footing on a narrow cat walk which separates fact from fiction, reality from fantasy,* and *practicability from chaos.* We believe that the Negro and white populations are proud of their communities. We enjoy a state of comparative serenity (especially as contrasted to conditions in schools located in some other sections of the nation), watching together the approach of better times, awaiting together with patience and sure expectation that the achievement of social justice in our collective conscience tells us must come. *With every ounce of sincerity which we possess we think freedom of choice is the best plan available. We are not today going to jeopardize the success already achieved by casting aside something that is working and reach blindly within an experimental "grab bag"....* The road to racial harmony has been rocky and often disappointing; but millions of citizens are dedicated to the cause of wiping out second-class citizenship and establishing mutual trust in race relations. We do not minimize the problems at hand. *These cases must be handled so as not to interfere with the primary, indeed the overriding, purpose of schools—that is, to render*

the best education possible to all our children. . . ." (emphasis added)

This court will note that these three District Judges were evaluating freedom of choice from the standpoint of all relevant factors, not the limited standard of statistics. They reflected educational and social imperatives, not lines on a graph. But their remarks gave a reasonable interpretation to every portion of the decision of this court in *Green*. The court found that the dual system was being eliminated at the "*earliest practicable date*" if that phrase admits of the relevance of community feelings and the development of programs to ease the transition for teacher and student. If that is not what the court meant, then we are at loss to understand what in fact it did mean. If *Green* demanded racial balancing immediately, surely it could have said so. The qualifying phrase "by the next school year" could easily have been inserted. Or it could have been done simply by assigning students in proportions to each school. *Green* positively refused to say this and should not be so construed. Lower appellate courts should not be tails wagging the dog, inserting serious restrictions this court has never made.

Judge Gordon West in the Eastern District, with respect to the parish boards under his jurisdiction, held similarly:

> "The question is not necessarily *has* it worked but rather *can* it work if properly implemented. And, if it has not worked, but if it *can* work, what must be done to make it work. . . ." (Original emphasis).

He then went on to point out that:

> "A review of the statistics in these cases show quite clearly that the imposition of the Jefferson decree resulted in a substantial increase in the number of Negroes attending white schools. For example, since the Jefferson decree became effective, the number of Negroes attending white schools in East Feliciana Parish rose from 17 to 52; in West Feliciana Parish, from 31 to 119; in West Baton Rouge Parish from 14 to 143; in Iberville Parish, from 25 to 448; in Ascension, from 40 to 101; . . . and in Pointe Coupee Parish, from 25 to 166. While these numbers may seem relatively small when compared to the total number of Negro students involved, they do, however, represent an increase of some 525%, i.e., from .08% to 5% of the total. . . ."

In plain truth freedom of choice does give the prospects of dismantling the dual system at the "earliest practicable date." Professional educators in these districts are only now free to make concerted and meaningful efforts to make freedom of choice really effective. Community feelings have reached a concensus of acceptance, Negro fears have been abated. Administrators can now concentrate on the education of all with special emphasis on the Negro and the disadvantaged. If this court will but lift the restriction in *Jefferson*, school administrators can even begin to encourage Negroes to exercise their free choice options. The increase of Negroes in white schools cannot but be the fruit of such efforts. We further urge that they can also make it work to accomplish those feats within

a reasonable interpretation of "earliest practicable date," within the meaning of *Green.*

We recognize that under the import of *Green:*

> ". . . Whatever plan is adopted will require evaluation in practice, . . ."

However it does no earthly good to re-evaluate daily or expect the eden of integration annually. An evaluation every three months reveals little change; the change in two years is extensive.

These school systems utilizing this plan must be given a fair chance to "make it work." It serves no useful purpose to talk about fifteen years since *Brown* when sixty years of *Plessy v. Ferguson* is in the background. This Court obviously realized this when it said:

> "In approaching this problem, we cannot turn the clock back to 1868 . . . or even to 1896. . . . We must consider public education in the light of its full development in its present place in American life throughout the nation."

We would not mislead this Court. The clocks cannot be turned back, neither can they be set forward. We are being candid when we say that freedom of choice will perhaps never root out prejudice. But it is an effective educational beginning and we are confident that it will produce a unitary system "at the earliest practicable date." And as confident as we are of this, we are much more certain that forced integration will not. Because if time cannot be changed, neither can history and human nature. The wise man works with history and human nature.

F. Increasing Faculty Integration will Enable Freedom of Choice to Eliminate the dual school system

Time and again *Jefferson* indicated that the key to a unitary school system was faculty desegregation. Quoted with approval was the statement of the Eighth Circuit in *Clark v. Board of Education of Little Rock School District*, ____F.2d____(1966):

> "We agree that faculty segregation encourages pupil segregation and is detrimental to achieving a constitutionally required non-racially operated school system." (Quoted in *Jefferson II* at page 89). Again, in its opinion the *Jefferson II* court stated:
>
> "A Negro faculty makes a Negro school; the Negro school continues to offer inferior educational opportunities; and the school system continues its psychological harm to Negroes as a class by not putting them on a level with white children as a class."

The Jefferson court correctly contended that extensive faculty integration was the key to a unitary system through freedom of choice. We agree. But again, the impatience of the Court of Appeals and these plaintiffs has seriously imperiled progress in this area. Under *Jefferson*, at least one teacher was assigned to a school in which he or she was in the minority. Taking the mental attitude of certain communities, these posts were not easily filled. But Superintendents resolutely fulfilled their obligations and some went beyond the requirements of *Jefferson*. Plans for next year, dis-

rupted by the Fifth Circuit opinion, called for substantial increases in faculty desegregation in all of the school districts. Superintendents, made confident by faculty and community acceptance and cooperation, feel confident that completely desegregated faculties are but a few short years away.

School administrators and community observers have watched with care the effect of faculty desegregation. Even in rural communities, white parents have accepted Negro teachers directing their children and no real racial incidents have occurred. White teachers assigned to Negro schools, understandably nervous by newspaper accounts of incidents involving white teachers and Negro students in our northern urban centers as well as our nation's capitol, were pleasantly surprised by the ease of the transition. Soon, as the photographs show, teachers of both races were working together as equals for the common concern of improved instruction.

The Court must not conclude from this that the fears of administrators were groundless. This smooth transition we are proud to describe was not the result of happenstance, the product of blind, dumb luck. Teachers were selected carefully with special emphasis on the attitude and adaptability of the teacher rather than special educational talents. Naturally, where testing revealed marked educational deficiencies, particularly in disadvantaged Negroes, teachers strong in the needed areas of education were recruited.

But administrators did more. Many hours were

spent, money expended on training sessions which have become the educational equivalent of group therapy. Problems are shared, common answers found, cooperation and harmony encouraged.

We know what plaintiffs would answer. They would score our program of faculty desegregation as tokenism. They would say that only the best talent was used. To some extent plaintiffs would be correct. But these careful beginnings were the only logical steps to begin such a program. Teacher fears had to be allayed and they to a great extent have. One incident, one misfit carelessly placed could have set the program back a decade. If plaintiffs would take that risk, it is only because their interest is entirely in racial balancing, not in maintaining a sound program of education.

In most districts administrators are prepared to double faculty desegregation and to continue annually a stepped-up pace until no school is racially identifiable through the composition of its faculty. This can be done largely through new replacements and younger teachers, the very group found to be most adaptable to meet the educational challenge.

How does this affect the success of freedom of choice? The *Jefferson* decision and the *en banc* decision of the three Western District Judges correctly believed that pupils would exercise freedom-of-choice options as faculties reflected a unitary system. Everyone, even plaintiffs, agreed with this three years ago. Why is this appraisal any less true today?

Under its conclusions of law the three-judge court stated:

> "(3) The model decree includes provisions for faculty integration. The United States Court of Appeals for the Fifth Circuit (on June 3, 1968) has set 'C-day' for full compliance with these provisions. Each school board's attention is specifically directed to the case of United States, et al v. Board of Education of Bessemer, et al. No. 25809, 5th Circuit, 1968. Each school board must comply and is specifically ordered to do so."

One mistake which counsel for plaintiffs consistently make, and which they urge the Court to make, is to assume that the faculty desegregation which has been accomplished by these school boards (and particularly their superintendent of schools) has been accomplished voluntarily. They, and the court below, constantly re-emphasize the fact that teacher tenure laws and other state laws may not stand in the way of the constitutional mandate to integrate faculties, as though these school boards have tried to utilize state law in such fashion. Nothing could be further from the truth. The term "voluntary" desegregation of faculty is really a misnomer.

The term "voluntary" completely ignores the persuasion, the reasoning, the twisting of arms and the begging on bended knee that these superintendents have had to do with their faculties in order to get competent, capable teachers, those with the proper attitude to make it work, (both Negro and white) to make the transfer. This completely ignores the count-

less hours that these superintendents and their staff members have utilized in discussion with individual teachers (evidence of this is in the records in all of these cases) as to the necessity and desirability of this transition. This includes hours spent not only with existing teachers with respect to transfers but in the employment of new teachers as well. It must be remembered than many of these parishes are financially poor and cannot compete with private industry or even other, larger, more prosperous school systems in the employment of teachers (in passing, we would point out that within the last month, there was an ad in the New Orleans Times Picayune by which the Washington, D.C. school system, with its 99.8% of Negro teachers in majority Negro schools, solicited teachers from this area at salaries considerably higher than these school systems can afford to pay).

These school systems presently admonish their prospective teacher applicants that their faculties are desegregated and the teacher must realize that she is likely to be appointed as a teacher in a school in which her race is in the minority. Some prospective teachers will not accept the job under those conditions. Many of these are new young teachers, just graduated from college, who have the kind of new thinking we continually need in our teaching profession. If these teachers won't accept employment under this possibility today—how many competent white teachers will these boards be able to employ after the "number game" is imposed and all of the schools in these school systems, with a 50-50 or 60-40 population ratio, have student

bodies and faculties that are predominantly Negro? Must we make these school systems, both student body and faculty, virtually all Negro, to satisfy the spirit of the Constitution? For there is no law, and constitutionally can be none, which requires a teacher to teach. No one, not even counsel for plaintiffs and intervenors, can keep a teacher from taking a job in private industry. No one can keep a man from deciding that he can support his wife and family without his wife, the teacher, working at all. Yes, once again it rears its ugly head—the risk of private discriminatory conduct by private individuals over whom these boards have no control—the risk of "*tearing out a school system root and branch at the same time the dual system is being eliminated root and branch.*" And, if we inadvertently tear out 'root and branch' the tree of learning, what do we really have left—for anyone?

Of course, neither counsel for plaintiffs nor this court have any way of really knowing what these superintendents and their staff have been through. They have overcome virtually insurmountable obstacles in accomplishing what they have accomplished to date. They will tell you, and have told the District Courts, as shown by the evidence in these records, that they could not have overcome these obstacles without the time that they have had under freedom of choice. Time for persuasion—time for adjustment. The writer can tell you, from first hand personal knowledge, that their own integrity as professional educators had a great deal to do with their accomplishments. These superintendents will also tell you that the support of their school boards

in their actions was also a direct factor in whatever success they have had heretofore. They will also tell you that the professional integrity and cooperation of their teachers and staff was a major contributing factor. These superintendents have told you in the record in these cases that they have no expectation that this cooperation will continue if they are forced into the compulsory program demanded by plaintiffs.

These school boards understand their duties in faculty desegregation and now that the transition has allayed opposition, are in a position to speed up the pace. In this manner freedom of choice can "at the earliest practicable date" dismantle the dual school system. This is what the *Jefferson* Court believed, and it is what the District Court Judges believed. We ask only that we be given an opportunity to show its success rather than be required to embark on the "numbers game" road to disaster demanded by counsel for plaintiffs.

III-A. Alternative plans to freedom of choice require the bussing of students in contravention of the Civil Rights Act of 1964.

The Civil Rights Act of 1964 captured the mood of Congress and the people when it declared that

> ". . . provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve

such racial balance, . . . Civil Rights Act, 1964 (Section 407(a)(2)).

Senator Humphrey, floor leader on the act, had no difficulty understanding the clear mandate contained in the cited section:

> "This addition seeks simply to preclude an inference that the title confers new authority to deal with 'racial imbalance' in schools, and should serve to soothe fears that Title IV might be read to empower the Federal Government to order the busing of children around a city in order to achieve a certain racial balance or mix in schools."
>
> * * * * *
>
> "Thus, classification along bona fide neighborhood school lines, or for any other legitimate reason which local school boards might see fit to adopt would not be affected by title IV, so long as such classification was bona fide. Furthermore, this amendment makes clear that the only federal intervention in local schools will be for the purpose of preventing denial of equal protection of the laws. 110 *Congressional Record*, page 12714.

Note the other excerpts from the Congressional debate:

> "Mr. Byrd of West Virginia. Can the Senator from Minnesota assure the Senator from West Virginia that under title VI school children may not be bused from one end of the community to another end of the community at the taxpayer's expense to relieve so-called racial imbalance in the schools?"
>
> "Mr. Humphrey. I do." 1964 *Congressional Record*, page 12715
>
> * * * * *

"Mr. Humphrey. As the law in the Federal Court now stands, while intentional gerrymandering of school districts to perpetuate segregation has been held to be a violation of the 14th Amendment, normal residential zoning resulting in de facto school desegregation will apparently be upheld by the courts. As to racial balancing, Judge Beamer's opinion in the Gary case is significant in this connection. In discussing this case, as we did many times, it was decided to write the thrust of the court's opinion into the proposed substitute. There was quite an argument about it among those of us who tried to prepare the substitute but the Senators may recall that the Supreme Court refused to grant certiorari in this case. In effect, the ruling of the Circuit Court has been upheld."

"Mr. Byrd of West Virginia. That may be true, but I must give my most careful attention to the proposal which we are studying and which may be enacted by the Congress. I merely wish to make doubly sure that the language is not unclear on the point, and I do not state at this time that I am opposed to the busing of children or that I support the busing of children. There is a great question in the minds of many Senators—and there is a question in my own mind—as to whether the subject, as treated herein, is completely unambiguous." 1964 *Congressional Record*, page 12715.

* * * * *

"Mr. Humphrey. . . . I should like to make one further reference to the Gary case. This case makes it quite clear that while the Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of

schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race, and we would be transporting children because of race. The bill does not attempt to integrate the schools, but it attempt to eliminate segregation in the school systems. The natural factors such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial balance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of section 4." 1964 *Congressional Record*, page 12717.

The clear provisions of the 1964 Civil Rights Act along with the clear intent of Congress against the bussing of children is the law of the land. It was enacted after considerable debate, a portion of which has been reproduced above. The architects of this statement of national policy were the elected lawmakers of this land, and their statement was a concensus of the national will. It remains to this day the law of the land because not a single word of it has been declared void by this Court.

Yet, the opinion of the Fifth Circuit Court of Appeals has violated virtually every key tenet of this national policy. Although the opinion does not command bussing, it requires conditions which make bussing inevitable. There is simply no way to pair schools in different neighborhoods or assign students to another

school outside the neighborhood without violating the prohibitions of the Civil Rights Act.

Does this Court think we are exaggerating? We can assure it that our fears are real, our remarks more than conjectural. As these words are written, Health, Education and Welfare employees, by invitation of our District Court, are moving through Louisiana like a swarm of locusts, briefly visiting each school system and fabricating integration plans. They are en masse making it abundantly clear that honest zones preserving the neighborhood school system do not represent sufficient compliance. Under orders of the District Courts acting in compliance of the harsh decision of the Fifth Circuit Court of Appeals, school boards have been put on notice that they may well be saddled with the programs devised by HEW representatives. As the returns come in, the HEW plans being constructed call for pairing beyond neighborhood zones and bussing of students throughout the system to achieve racial balancing.

B. The HEW Plans

The decision of the Fifth Circuit Court of Appeals rendered on May 28, 1969, impelled the District Courts to see that new school integration programs were devised. These produced the orders from the three Western District Judges and Judge West of the Eastern District. The orders were uniform and required cooperative action with representatives of Health, Education and Welfare. The representatives were to be skilled in education and its administration.

Heretofore we have made reference to HEW educational representatives who in response to these directives descended on school administrators. They surveyed facilities, talked with superintendents and their aides, showed interest in long- and short-ranged plans and listened to administrative problems. The more candid admitted that the time schedule for a totally integrated system (September, 1969) was most unrealistic and deterred the planning in depth that must necessarily precede such a result.

But the most tragic problem of all was the confession by virtually all of these teams that they were but messengers, chessmen who could and would be manipulated by the all-powerful hands of those far removed from the local situation. Despite this, in some areas the HEW educational experts placed great weight on the educational imperative and made realistic and educationally sound concessions.

The results were as the HEW educators predicted. The architects of the HEW plans were civil rights enforcers, not educators. We cannot name or describe them for the simple reason that they never appeared in the parishes and school offices. Such things as facilities, longrange plans, monies available, bus routes, and teacher situations were irrelevant to their calculations; these are the arithmeticians who believe integration is a matter of mathematical formulae. We wonder why they went to the trouble of sending educators, since in their scheme of things educational factors are totally unimportant. If ever Courts were hoodwinked, these two Districts Courts were. And so were the school ad-

ministrators. Reassured that finally the situation would be viewed through educators' eyes, they little suspected that behind the facade of educational concern, the percentage game was being played with a vengeance. One wonders if these educators resent being so shabbily used.

Surely this Court thinks we exaggerate; perhaps it thinks that we have no cause to complain about any methods that produce legal compliance. But aside from these evasive tactics, the plans of HEW are in legal compliance only with the most preposterous social schemes of the plantiffs and intervenors. They defy the edicts of virtually every federal Court including this Supreme Court; they even rush beyond the most farreaching proposals of the Court of Appeals for the Fifth Circuit. They callously and arrogantly shred the will of Congress as expressed in the 1964 Civil Rights Act. And finally, they indifferently disregard the will of the very people struggling in their net, white and black.

A few examples will suffice. In Shreveport, Louisiana, a city of just under 200,000 people, the HEW plan pairs one formerly all-white school (South Highlands) with a formerly all-Negro school (Central) more than four miles apart. Grade school children who walked to school must now traverse four miles of busy streets and snarled morning traffic to satisfy some HEW agent who was too busy or indifferent to spend even a day facing the community he now seeks to rearrange at his pleasure.

In Bienville Parish, children are now to be bused well over twenty miles to achieve someone's idea of racial balance. Travel may be broadening, but when it is through backwoods country in Bienville, it hardly takes the place of education. In most other parishes white or Negro students are bused for countless miles to achieve racial balance.

There is an Alice in Wonderland atmosphere in all of this. Or in Alice's terms, it gets "curiouser" and "curiouser". A group of young lawyers and amateur sociologists have by persistence and zeal converted *Brown I* prohibiting discrimination into a scheme for racial balancing; defied the Civil Rights Act as though it were the product of a rollicking Elk's convention rather than the will of our nation's highest lawmakers and presented and explained by a man who was almost our nation's president; captured an organ of the nation's executive branch and blandly operate as they wish without regard to the policy statements of the President, Mr. Finch and Mr. Mitchell; and have terrorized the South in a manner calculated to turn "Crazyhorse" Sherman green with envy.

Nowhere else in this entire nation has the neighborhood school system been scrapped to please these HEW enforcers. They do not dare to present such plans in our nation's capital, more segregated de facto (but for the same reason-private prejudice of individuals) than most of these Southern communities. But unless this Court acts, this group by legal default are about to impose a system which beyond peradventure will shatter into pieces the public school system in these areas.

It is, of course, true that tragedy in remote places can be viewed with detachment by those who live elsewhere. It is not by accident that HEW schemes are more closely and suspiciously surveyed by judges living in the communities on which they will be imposed. There is no justification in assuming that this attitude by local judges is the result of social pressures. In other areas, such as redistricting, these same judges have performed their obligations with courage and zeal.

This Court must act; it must act now. It must restore education to those who love and serve it. It must rescue and retrieve it from those who would convert it into a crucible for social experiment or as a whip to inflict punishment. Freedom of choice, a bare two years old, did not achieve immediate racial balancing. Plaintiffs and enforcement agents are disappointed because more was expected. Their frustration, however, must not be allowed to govern and destroy our system.

C. Clarification of National Policy

It is time that national policy be clarified. If the provisions of the Civil Rights Act of 1964 recited above violate the Fourteenth Amendment, this Court should courageously and forthrightly say so. If the prohibitions against bussing for racial balancing are consonant with the Constitution, then it is high time for this Court to construct limits to this and other recent decisions of the Fifth Circuit Court of Appeals. The American people and these school boards have every right to a clear statement from this Court as to how far inferior courts may go to demand racial balancing

and forced integration. They have every right to know the force and effect of Congressional policy which purports to be the law of the land, and which inferior Federal courts ignore as though it never existed. Nothing less than a clear statement by this Court will suffice; it should come soon; it should come now.

There is tragedy inherent in these cases. Somehow in this war of recriminations education becomes the first casualty. The innocent children, both white and Negro, lie callously forgotten, submerged beneath the mass of statistics and data.

Perhaps these observations are irrelevant; they are not written to heap scorn on any segment of our society or to impugn the motives of any parties to these lawsuits. Hopefully, all parties are too mature to manipulate children and their education as pawns toward any goal other than their welfare. The stakes are too vital to become the subjects of cavalier experimentation by those whose responsibility to all our youth is so slight that they can pay a hotel bill, shrug off failure and inaugurate some new social experiment elsewhere. We who must reassemble the pieces of a fractured society know this all too well.

There have been times that we felt these plaintiffs and intervenors would sacrifice our entire educational system to score a neat constitutional victory. We have refrained from saying so, however stung by their assumption of moral superiority. Unhappily the Court of Appeals has fallen into the habit of modeling their opinions to suit counsel for plaintiffs and the govern-

ment. It is too bad that the opinion of the Court of Appeals, indignant perhaps at the slow pace of freedom of choice, could not include in their impressive array of legal arguments even a germ of consideration at what will happen to students traumatically rearranged by some cold mathematical formula. Somehow, is it not just as vital what will happen emotionally and educationally to the Negro student torn rather than weaned from an educational environment in which he can compete successfully? Is he less important than the Court's arithmetic?

It may be that present constitutional doctrine dictates that the educational achievement of the white student must be sacrificed to upgrade Negro education. However, no one can argue logically that the education of *both* white and Negro students must be deferred to mathematical integration. Any education plan that does not provide the best education possible to both Negro and white students is unjustifiable. By any standard a plan that does violence to the educational achievements of both groups deserves summary rejection. That is why we so earnestly ask of this Court a review of the opinion of the Appellate Court below and a reinstatement of a system of freedom of choice and faculty integration. Such a system is the only one which can promise to provide quality education while satisfying the imperatives of the Fourteenth Amendment.

CONCLUSION

We recognize that the approach taken by this petition is completely divergent from that taken by appellants. Appellants urge the Court towards speed and

numbers. These school boards urge the Court toward gradualism, improved education for all, and improved race relations. The two approaches are necessarily incompatible. Speed, immediacy, and compulsion will proscribe all else—the better education—the elimination of prejudice and discrimination—and, finally, even the numbers and percentage mix.

The writers, after working with professional educators and school board members at the local, state, and national level, are convinced that the professional educators and school board members throughout this nation are men of integrity, ability, compassion and good will and, as is now being recognized throughout this nation, are the future "experts" in race relations. As men of good will everywhere are beginning to recognize, these professional educators may hold the key, *the only key*, to the ultimate elimination of prejudice and discrimination, not only in our nation's schools, but in our entire national life. This Court should not allow the argument for speed, immediacy, massiveness and compulsion, itself of doubtful constitutional validity, to now destroy that key, or jam the lock before the key can be used.

For these reasons, this petition for a writ of certiorari should be granted.

August 11, 1969.

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CERTIFICATE OF SERVICE

I, John F. Ward, Jr., one of the attorneys for petitioner and a member of the Bar of the United States Supreme Court, do hereby certify that on this 11 day of August, 1969, I served copies of the foregoing petition for Writ of Certiorari on all attorneys for respondents and intervenors by mailing same, postage prepaid, to their respective offices as shown below:

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PATRICK HARDIN
Department of Justice
New Orleans, Louisiana

Baton Rouge, Louisiana, this 11 day of August, 1969.

John F. Ward

JOHN F. WARD, JR.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

Civil Action No. 9981
CONLEY, ET AL
v.
LAKE CHARLES SCHOOL BOARD AND
CALCASIEU PARISH SCHOOL BOARD

Civil Action No. 10687
LEMON, ET AL
v.
BOSSIER PARISH SCHOOL BOARD;
UNITED STATES, Intervenor

Civil Action No. 10902
GORDON, ET AL
v.
JEFFERSON DAVIS PARISH SCHOOL BOARD

Civil Action No. 10903
TRAHAN, ET AL
v.
LAFAYETTE PARISH SCHOOL BOARD

Civil Action No. 10912
MONTEILH, ET AL
v.
ST. LANDRY PARISH SCHOOL BOARD

Civil Action No. 10946
VALLEY, ET AL
v.
RAPIDES PARISH SCHOOL BOARD;
UNITED STATES, Intervenor

Civil Action No. 11053
GRAHAM, ET AL
v.
EVANGELINE PARISH SCHOOL BOARD

Civil Action No. 11054
ROBERTSON, ET AL
v.
NATCHITOCHES PARISH SCHOOL BOARD

Civil Action No. 11055
JONES, ET AL
v.
CADDO PARISH SCHOOL BOARD;
UNITED STATES, Intervenor

Civil Action No. 11125
BATTISE, ET AL
v.
ACADIA PARISH SCHOOL BOARD

Civil Action No. 11126
HENDERSON, ET AL
v.
IBERIA PARISH SCHOOL BOARD

Civil Action No. 11130
JOHNSON, ET AL
v.
JACKSON PARISH SCHOOL BOARD;
UNITED STATES, Intervenor

Civil Action No. 11297
ANDREWS, ET AL
v.
MONROE CITY SCHOOL BOARD

Civil Action No. 11304
BANKS, ET AL
v.
CLAIBORNE PARISH SCHOOL BOARD

Civil Action No. 11314
THOMAS, ET AL
v.
ST. MARTIN PARISH SCHOOL BOARD

Civil Action No. 11329
WILLIAMS, ET AL
v.
MADISON PARISH SCHOOL BOARD

Civil Action No. 11351
BOUDREAUX, ET AL
v.
ST. MARY PARISH SCHOOL BOARD

Civil Action No. 11501
GILBERT, ET AL
v.
WEBSTER PARISH SCHOOL BOARD

Civil Action No. 11577
SMITH, ET AL
v.
CONCORDIA PARISH SCHOOL BOARD;
UNITED STATES, Intervenor

Civil Action No. 11908
CELESTAIN, ET AL
v.
VERMILION PARISH SCHOOL BOARD

Civil Action No. 12071
UNITED STATES OF AMERICA
v.
LINCOLN PARISH SCHOOL BOARD

Civil Action No. 12169
UNITED STATES OF AMERICA
v.
RICHLAND PARISH SCHOOL BOARD.

Civil Action No. 12171
TAYLOR, ET AL
v.
OUACHITA PARISH SCHOOL BOARD

Civil Action No. 12177
UNITED STATES OF AMERICA
v.
BIENVILLE PARISH SCHOOL BOARD

Civil Action No. 12265
UNITED STATES OF AMERICA
v.
GRANT PARISH SCHOOL BOARD.

Civil Action No. 12589
UNITED STATES OF AMERICA
v.
DESOTO PARISH SCHOOL BOARD

Civil Action No. 12721
UNITED STATES OF AMERICA
v.
AVOYELLES PARISH SCHOOL BOARD

Civil Action No. 12722
UNITED STATES OF AMERICA
v.
EAST CARROLL PARISH SCHOOL BOARD

Civil Action No. 12880
MOORE, ET AL
v.
WINN PARISH SCHOOL BOARD

Civil Action No. 12924
CLEVELAND, ET AL
v.
UNION PARISH SCHOOL BOARD

FOR PLAINTIFFS

Jesse H. Queen, Esquire
Department of Justice
Civil Rights Division
Washington, D.C. 20530

Edward S. Christenberry, Esquire
Department of Justice
Civil Rights Division
Washington, D.C. 20530

PER CURIAM:

In the summer of 1967 we entered decrees in exact conformity with the model decree as set forth just shortly before by the Fifth Circuit in *Jefferson.*[1]

The question for decision is whether under all the circumstances here present the "freedom of Choice plans," which defendant school boards were compelled, under court order, to put into effect in the fall of 1967, constitute adequate compliance with the Board's responsibility "to achieve a system of determining admission to the public schools on a non-racial basis * * *." Brown v. Board of Education, 349 U.S. 294, 300-301 (Brown II).

Specifically, we are ordered by the United States

[1] United States v. Jefferson County Board of Education (5th Cir., 1966), 372 F.2d 836, aff'd on re-hearing en banc, 5th Cir., 1967, 380 F.2d 385, cert. denied 1967, 389 U.S. 840.

Court of Appeals (Adams, et al v. Matthews, et al, August 26, 1968) to make findings as to whether these plans are adequate to convert the dual system to a unitary system in which racial discrimination would be eliminated root and branch. In making this determination our duty has been set forth by the Supreme Court of the United States in the recent case of *Green, et al v. New Kent County, Virginia, et al* (36 L.W. 4476):

> "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system 'at the earliest practicable date,' then the plan may be said to provide effective relief. Of course, where other, more promising courses of action are open to the board, that may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will

require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed. See No. 805, *Raney v. Board of Education*, post, at p. 5.

"We do not hold that 'freedom of choice' can have no place in such a plan. We do not hold that a 'freedom-of-choice' plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that in desegregating a dual system a plan utilizing 'freedom of choice' is not an end in itself."

It must be emphasized at the outset that there is no proposed plan by the school boards. They now operate under a circuit-wide uniform decree. They have been admonished indirectly (no later than June 3, 1968) not to tinker with this model decree. *U.S., et al v. Board of Education of Bessemer, et al* (5th Cir., June 3, 1968). However, it has now been spelled out that if the specifics of *Jefferson* do not have real prospects of dismantling the dual system of schools at the earliest practicable date, then the school boards must formulate a new plan, and in light of other courses open to them, such a zoning, fashion steps to convert promptly to a system without a "white school" and a "Negro school," but just schools.

We find as a fact that:

1. The school boards are acting in good faith.

2. The Jefferson decree under which they have been operating since the fall of 1967 has real prospects for dismantling the dual system "at the earliest *prac-*

ticable date", especially in light of the substantial assignment of faculty members to schools of the opposite race, which naturally encourage students of both races to transfer.

3. The documentary evidence in each case speaks for itself and is incorporated herein by reference.

4. Most of the parish school systems involved operate on six 6-weeks periods each year. Sometimes the school year is referred to as having a "first semester" and a "second semester." This is a misnomer. For many years the school systems have operated on the basis of the "school year," wherein the courses run for some nine months, and the pupils, especially in elementary schools, remain with the same teacher in the same course for that length of time. There are only a few exceptions.

CONCLUSIONS OF LAW

(1) Freedom of choice is a permissible means to a constitutionally required end—the complete abolition of segregation and its effects. If it proves effective, it is acceptable. If it fails to undo segregation, other means must be sought.

(2) The school boards and their officials have the continuing affirmative duty to take whatever courses which appear open to them to further eradicate race as a distinction in school facilities, student bodies, activities and faculties.

(3) The modern decree includes provisions for faculty integration. The United States Court of Ap-

peals for the Fifth Circuit (on June 3, 1968) has set "C-day" for full compliance with these provisions. Each school board's attention is specifically directed to the case of *United States, et al v. Board of Education of Bessemer, et al*, No. 25809, 5th Circuit, 1968. Each school board must comply and is specially ordered to do so.

(4) This Court retains jurisdiction in each case.

(5) There may be other courses which might be open to a board or boards which will meaningfully assist "freedom of choice" in disestablishing the dual system Each board should re-assess its own system and on or before March 1, 1969 make a report to this Court as to what additional courses are open to it to bring about the end result required by the Supreme Court in *Green*.

Green involved a school system with only two schools. There, it was held that under all the circumstances the freedom of choice plan was not working. Every plan, *Green* says, must finally check out in tests of practicality, promise and realism. *Green* does not burden any school system with a demand for action so traumatic that it tears out a school system root and branch at the same time the dual system is being eliminated. Considering conditions which existed for nearly a century following Emancipation, real progress has been made with *Jefferson* freedom of choice and its decree permitting such freedom (most recently approved in *Green*), if it is working. A sense of security and happiness on the part of a pupil is a tremendous

asset in his learning process. Prior to *Jefferson* (1967), integration was practically nil. In 1967 the Jefferson decree was entered. Approximately 4,986 Negro students attended previously all-white schools as a result. In 1968 there are 7,550 attending. In 1967 there were approximately 300 teachers in schools of the opposite race. In 1968 there are approximately 1,000. The so-called "all white" schools are almost a thing of the past. We still have so-called "Negro schools" but almost all have white faculty members. It is our belief, based upon facts in these records, that the March 1st reports may reveal other courses open to bring about the ultimate result commanded in *Green*. Freedom of choice has certainly worked for the 7,550 pupils who were given the opportunity and did choose a school of the opposite race. This progress deserves praise. It is manifestly impossible for any plan to "promise" realistically to work "now", if "now" means "tomorrow." Since "now" cannot mean "tomorrow," then it must mean something in the sense of time which can be equated with the connotations of other expressions so often used in *Green*, such as "practicable" and "realistic." Freedom of choice is working in most of our parishes. Some think the progress is too slow—the Government calls it a "glacial movement." Many others think it is going too fast. But any fair-minded man will agree that in most parishes there is progress. The direction is clear. The goal is clear. The direction is right; the goal will be reached. It is no more a problem than of maintaining a steady footing on a narrow catwalk which separates fact from fiction, reality from fantasy, and practic-

ability from chaos. We believe that the Negro and white populations are proud of their communities. We enjoy a state of comparative serenity (especially as contrasted to conditions in schools located in some other sections of the nation), watching together the approach of better times, awaiting together with patience and sure expectation that the achievement of social justice and our collective conscience tells us must come. With every ounce of sincerity which we possess we think freedom of choice is the best plan available. We are not today going to jeopardize the success already achieved by casting aside something that is working and reach blindly into an experimental "grab bag." Rather, we will hear from each school board, as indicated, in March concerning other plans, if such are "practicable" and "reasonable", to supplement freedom of choice.

We have heard these cases "en banc" and rendered this ruling together. The Supreme Court of the United States has stated that "no one plan will do the job in every case." Some of the parishes have made splendid progress. Vermilion, for example, now has 44% of the total of the Negro students in predominantly white schools. We have retained jurisdiction and each case in the future is assigned to the original judge who initiated the orders. That judge will make any additional findings or conclusions he might deem appropriate. Any motions for rehearing on any specific case should be addressed to the individual judge handling that specific case. Each judge will make further findings, if they are required, in each individual case after re-

ceiving the March 1, 1969 report by the respective school boards.

The road to racial harmony has been rocky and often disappointing; but millions of citizens are dedicated to the cause of wiping out second class citizenship and establishing mutual trust in race relations. We do not minimize the problems at hand. These cases must be handled so as not to interfere with the primary, indeed the overriding, purpose of schools—that is, to render the best education possible to all our children. We deem it appropriate to conclude by quoting verbatim the language of the Honorable John R. Brown, Chief Judge of the United States Court of Appeals for the Fifth Circuit:

> "Finally, we think it appropriate to sound these comments. We do not seek the burden or responsibility of school operation. We ought not to have it. By now the law is clear. These cases bear many service stripes including many trips to this Court. The aim of *Jefferson* is to lay down sufficiently definitive standards so all can understand and apply them. *Now it should be up to school boards either alone in taking the initiative so obviously called for, or in conjunction with cooperative (it is hoped) efforts of parent, race or similar groups to achieve the goal of race-less public schools.* To be sure, this puts burdens on all sides but this, too, is part of constitutional democracy. *The Judiciary is not, cannot be, the universal salvor.* In saying this we believe we express for the District Judge—indeed all of them—a like hope that the schools soon run without orders of any

kind from Courts, Federal or State." U.S. v. Bessemer, et al, No. 25809, 5th Cir., June 3, 1968. (Emphasis added)

THUS DONE AND SIGNED on this the 13th day of November, 1968.

/s/ BEN C. DAWKINS, JR., Chief Judge,
United States District Court

/s/ EDWIN F. HUNTER, JR.
United States District Judge

/s/ RICHARD J. PUTNAM
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

Civil Action No. 1068
LAWRENCE HALL, ET AL
v.
ST. HELENA PARISH SCHOOL BOARD, ET AL

Civil Action No. 2921
JAMES WILLIAMS, JR., ET AL
v.
IBERVILLE PARISH SCHOOL BOARD, ET AL

Civil Action No. 3164
YVONNE MARIE BOYD, ET AL
v.
POINTE COUPEE PARISH SCHOOL BOARD, ET AL

Civil Action No. 3197
TERRY LYNN DUNN, ET AL
v.
LIVINGSTON PARISH SCHOOL BOARD, ET AL

Civil Action No. 3208
DONALD JEROME THOMAS, ET AL
v.
WEST BATON ROUGE PARISH SCHOOL BOARD, ET AL

Civil Action No. 3248
ROBERT CARTER, ET AL
v.
WEST FELICIANA PARISH SCHOOL BOARD, ET AL

Civil Action No. 3253
SHARON LYNNE GEORGE, ET AL
v.
C. WALTER DAVIS, PRESIDENT, EAST FELICIANA PARISH SCHOOL BOARD, ET AL

Civil Action No. 3257
WELTON J. CHARLES, JR., ET AL
v.
ASCENSION PARISH SCHOOL BOARD, ET AL

WEST, Chief Judge:

These school desegregation cases, involving the public school systems of the eight parishes (counties) within the Baton Rouge Division of the Eastern District of Louisiana are once again before the Court. This time they come up on motions filed not, apparently, on behalf of any actual parties to the suits, but by and on behalf of the attorneys of record for plaintiffs and the Attorney General of the United States, requesting "additional relief." Arguments on these motions were first presented to the Court on July 19, 1968, at which time this Court continued the hearing on November 4, 1968 and directed all parties to present, by that time, affidavits deposition testimony and briefs. The order of continuance was appealed, and on August 20, 1968, the Fifth Circuit Court of Appeals denied plaintiffs' motions for injunction pending appeal, and denied plaintiffs' request for an expedited hearing on appeal, and further denied plaintiffs' motions for a summary reversal of this Court's order. At this same time, however, the Court of Appeals ordered this Court to do what it

had already, on its own motion, done, i.e., set the motions for hearing on November 4, 1968. The Court of Appeals further directed that if this Court should conclude that the existing freedom of choice plan would not work, it should require the various school boards to formulate new plans and submit them to the Court by November 28, 1968. In view of this Court's findings, no such requirement was made. At the outset, this Court entertains serious doubt, under the circumstances of these cases, as to the authority of the attorneys of record for plaintiffs or the attorneys for the Department of Justice to reopen these matters. I say this simply because there has been no evidence, of any kind, that anyone, except the attorneys themselves, has made or filed any complaint as required by the Civil Rights Act of 1964, 42 U.S.C.A. 2000c, et seq. Section 407(a) of that Act provides in part as follows:

> "Sec. 407. (a) Whenever the Attorney General receives a complaint in writing—
>
> "(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or
>
> "(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin,
>
> "and the Attorney General believes the complaint

> is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized * * * to institute for or in the name of the United States a civil action in any appropriate district court of the United States * * *." 42U.S.C.A. 2000c-6.

Despite repeated requests by the Court, neither counsel for the alleged plaintiffs, nor counsel for the Government were able to present this Court with a single complaint, made in writing or otherwise, by any student, parent, or guardian to the effect that any student, in any of the schools involved, is being deprived by a school board of the equal protection of the law or that any student has been denied admission to or not permitted to continue in attendance at a public school or college by reason of race, color, religion, or national origin. It would seem to this Court that, according to the Civil Rights Act, such a complaint is required before legal action can be initiated. These cases should be decided not upon the question of whether or not the schools are being operated in accordance with the sociological beliefs of the attorneys involved but rather on the question of whether or not they are being operated in such a way as to protect and preserve the constitutionally guaranteed rights of the students. But if past experience is any indicator, it would be a waste of time

for this Court to require these "technicalities" to be complied with before deciding these cases. Since there seems to have been developed, at the appellate level, a separate set of standards to be applied in civil rights cases, we will leave the question of whether or not these cases are properly before the Court for determination on appeal. Suffice it to say that if we were permitted to apply the same standards that are required in ordinary civil actions, it would seem extremely doubtful that any justiciable issue has been presented to this Court. It would seem to this Court that the ends of justice would better be served if the litigants were required to adhere to both the well established rules of civil procedure and the specific requirements of the statutes involved before their cases were considered by the Court. But lest such a requirement now be misunderstood as a device for delay, we will leave that question for the Court of Appeals and proceed with a determination of the issues presented.

The attorneys of record, who somehow seem to have become the plaintiffs in these cases, have asked for additional relief for people who apparently, according to the record, have not complained. Specifically they ask that the freedom of choice provision of the Jefferson-type decree, under which all of these school boards are presently operating, be discarded as unconstitutional and unworkable, and that the school boards now be required to come up with some new plan that will work more to the liking of the attorneys involved. They contend that this change of plans is

required by the holding in *Green v. County School Board of New Kent County, Va.*, 1968, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716. Such a contention is, of course, without merit. The Supreme Court in *Green* specifically negated such a contention when it said:

> "We do not hold that 'freedom of choice' can have no place in such a plan. We do not hold that a 'freedom of choice' plan might of itself be unconstitutional, although that argument has been urged upon us."

Thus, it is clear that there is no constitutional impediment to a freedom of choice plan as such. But on the other hand, it has been established by decisions too numerous to mention that there is an absolute duty resting with the various school boards to bring about, by one means or another, the complete and immediate disestablishment of the long standing state imposed dual school systems which they have, in the past, operated. As has been stated over and over again by the Fifth Circuit Court of Appeals and the Supreme Court of the United States, there must be no white schools and no negro schools but just plain schools. As stated in *Green:*

> "Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. * * * The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."

The question before us then is to determine whether or not, under the facts of these cases, such a mandate has been, or is being met by the defendant school boards.

It must be borne in mind that unlike the situation in *Green*, the defendant school boards here are operating not under a plan devised by them, but under a plan devised, in every minute detail, by the Fifth Circuit Court of Appeals. This plan is the so-called "Jefferson Plan" enunciated in *United States v. Jefferson County Board of Education*, 380 F. 2d 385 (1967). This plan was imposed upon all of the defendant school boards on August 7, 1967, to become effective at the commencement of the 1967-68 school year. Thus the plan has been in operation for only a little over one full school year. The question is not necessarily *has* it worked but rather *can* it work if properly implemented. And, if it has not worked, but if it *can* work, what must be done to make it work. A review of the statistics in these cases show quite clearly that the imposition of the Jefferson decree resulted in a substantial increase in the number of negroes attending white schools. For example, since the Jefferson decree became effective, the number of negroes attending white schools in East Feliciana Parish rose from 17 to 52; in West Feliciana Parish, from 31 to 119; in West Baton Rouge Parish, from 14 to 143; in Iberville Parish, from 25 to 448; in Ascension Parish, from 40 to 101; in Livingston Parish, from 3 to 7; in St. Helena Parish from 25 to 71; and in Pointe Coupee Parish, from 25 to 166.

While these numbers may seem relatively small when compared to the total number of negro students involved, they do, however, represent an increase of some 525%, i.e., from .8% to 5% of the total. These figures are not cited for the purpose of in any way indicating that the amount of integration resulting thus far from the Jefferson Plan is enough to say that the burden of the school boards has necessarily been properly discharged. They are cited merely for the purpose of showing that substantial progress has been made, and that further progress, as hereinafter indicated, can be made under this plan. This Court is not unmindful of the fact that out of a total of 57 "white" schools involved in these cases, 27 are still "all white" and that not one of the 47 "negro" schools involved has a single white pupil in attendance. But this fact alone does not necessarily lead to the conclusion that the present plan will not work, or indeed that it has not worked. *Green* does not hold that every plan which, after being fully implemented, allows some schools to exist where only white children or only negro children are in attendance is per se unconstitutional. In *Green*, the United States Supreme Court has merely repeated what it has said many times before, i.e., that any desegregation plan adopted by a school board must, in order to be held constitutional, operate in such a way as to bring about the complete disestablishment, now, all of all vestiges of *state imposed* dual school systems. If a school is, in fact, attended solely by negro children or solely by white children as a result of a bona fide, unfettered

freedom of choice, the segregation that thus results is not state imposed but is instead de facto segregation. Under the present state of the law, there is no constitutional impediment to purely de facto segregation. But the burden is upon the school board, when such segregation exists, to prove that the segregation is, in fact, de facto rather than state imposed. The Congress specifically recognized the individual right to de facto segregation when it enacted the Civil Rights Act of 1964. For example, in defining desegregation, the Act says:

> "* * * but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C.A. 2000c (b).

And again, the Act states specifically that:

> "* * * nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." 42 U.S.C.A 2000c-6(a).

When the Supreme Court, in *Green*, repeatedly referred to "state imposed" segregation, it obviously took cognizance of this congressional mandate. Our inquiry must therefore be directed first to the question of whether or not the provisions of the present plan have, in fact, been implemented as ordered by this

Court, and secondly, if they have not, will a proper implementation of that plan result in the disestablishment, now, of a state imposed segregated school system. After carefully reviewing the facts in these cases, it is the opinion of this Court that first, the provisions of the existing plan have not, in all cases, been fully implemented by the school boards, and second, a complete implementation of the present plan will result in all constitutional requirements having been met. In connection with the assignment of students to particular schools, the plan under which these schools are presently operating provides, inter alia, that during the "choice period" to be established by the school board prior to the opening of school at the beginning of each school year, each student, both white and negro, must exercise a free choice of schools. The plan then provides that any student who has *not* exercised his choice of school within a week after school opens *shall be assigned* to the school nearest his home where space is available under standards for determining available space, which standards shall be applied uniformly throughout the system. From the evidence presented to this Court, it seems apparent that in some instances these important provisions of the existing plan have not been fully implemented or enforced by the defendant school boards. For example, while the reports filed by the various defendant school boards with this Court pursuant to the requirements of the Jefferson decree under which they now operate indicate that in the Parishes of Ascension, Livingston, Pointe Coupee,

and East Feliciana, all students did, in fact, exercise their freedom of choice as to the school they wished to attend, thus eliminating, under the plan, the necessity for geographic assignment, such was not the case in the Parishes of Iberville, West Feliciana, St. Helena, and West Baton Rouge. In the latter four parishes, the reports filed indicate that there were many students who did not exercise their freedom of choice but there is no indication that they were then assigned geographically to the school nearest their homes. It is also the opinion of this Court that a strict adherence to these requirements will result in the disestablishment of a state imposed dual system of schools such as is forbidden by existing law, while at the same time preserving the freedom of choice that this Court sincerely believes to be a constitutionally guaranteed right of every pupil. If, after scrupuously implementing these provisions, there should exist a school or schools which happen to have all white or all negro pupils, such would be the result of free choice, or of de facto segregation, which, under the present state of the law, does not, in this Court's opinion, violate constitutional mandates. Certainly there is nothing more democratic than freedom of choice. This simply must be preserved. The geographic assignment of those who do not affirmatively exercise a choice relieves those students of the burden which the Courts have decreed to be the burden of the school boards and thus overcomes the objection of improperly placing the burden of desegregation on those students.

Another way to accomplish the same end would be to initially assign all students to the school nearest their homes and then to honor any requests for transfer to a school of the students' choice. While the same result would be reached in both cases, it seems that the present plan is the better of the two because there is less duplication of work involved. Before geographic assignments are made under the present plan, all students choosing a particular school are assigned to the school of their choice without the necessity of an initial assignment followed by reassignment because of the transfer request.

This Court is convinced that the present plan will, if followed, assure the prompt and effective disestablishment of all state imposed dual systems of schools in the eight parishes involved. Why, then, it will surely be asked, has it not done so? This Court is of the opinion that the mandate of the present plan has not been fully implemented. In the case of the four parishes previously mentioned, the record fails to show that all pupils who did not make an affirmative choice of schools were in fact assigned to the schools closest their homes. This is an extremely important provision of the present plan. It is important because it relieves those students who for one reason or another will not, or dare not, make an affirmative choice, from the burden of disestablishing a state imposed dual system, and it places that burden squarely upon the school boards, where the Courts have said it belongs. To ignore the geographic assignment provision of the plan largely defeats the purpose of the

plan. It must be borne in mind that under the present plan even when the mandate of geographic assignment is honored, the right to freedom of choice still exists, as it must if we are to protect the constitutional rights of everyone rather than only those of a select few. The present plan specifically provides that within certain specific times the pupil may, even after a geographic assignment is made, make a specific choice and be transferred to the school of his choice. Thus under this plan, the student is relieved, if he wishes to be, of making an affirmative choice, in which event he will know that he will attend the school closest his home, or, on the other hand, he may, if he wishes, make an affirmative choice of schools with the knowledge that he will be permitted to attend that particular school.

Any consideration of why geographic assignments have not been made, if indeed they have not been, in accordance with the mandate of the plan, necessarily includes an inquiry into the good faith of the school boards. After carefully studying the local conditions and the progress made during the last year and a half toward desegregation of the schools in these eight parishes, this Court concludes that the school boards have acted in good faith. While they seem to have failed, in some instances, to have carried out the mandate concerning geographic assignment, they have nevertheless made considerable progress toward disestablishment of state imposed dual systems of schools. But while they have apparently acted in good faith in making noticeable progress

toward desegregation, the failure to fully implement the existing plan can no longer be tolerated. If, after a *full implementation* of the present plan, in every detail, including assignment of students, integration of faculty, transportation, athletics, and all other school facilities and activities, it does not realistically work as contemplated by *Brown v. Board of Education of Topeka*, 1954, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873; *Brown v. Board of Education of Topeka, Kansas*, 1955, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083; and *Green v. County School Board of New Kent County, Va.*, 1968, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716, then, and in that event, other means to secure that end must be sought. It can no longer be said that the plan is working if there remains any semblance, anywhere, of continued state imposed segregation in the schools. But until the present plan has been given full opportunity to work, this Court is reluctant to order new and different plans submitted.

In order that there be no misunderstanding about the cumpulsory nature of the desegregation plan presently in effect, all defendant school boards are hereby put on notice that should any defendant school board, at the commencement of the 1969-70 school year, and thereafter, fail to completely implement, in good faith, all details of the existing plans, this Court will then entertain contempt proceedings against all such persons who refuse or fail to comply with the mandate thus issued and contained in the existing desegregation plans.

We have concerned ourself primarily herein with the assignment of pupils to the various schools involved. By doing so we do not mean to imply that all is well insofar as desegregation of faculty and facilities is concerned. While good faith efforts have indeed been made toward faculty integration, nevertheless, with increased integration of students there must come increased integration of faculty. If the school boards are to be allowed to continue operating under the present plans, the commencement of the 1969-70 school year must bring with it not only a complete implementation of the student assignment provisions of the plans, but also a significant increase in faculty integration and a complete, total integration of transportation, athletics, and all other school facilities and activities. If a complete disestablishment of all state imposed dual systems of schools in these parishes does not result by the commencement of the 1969-70 school year, it may well be necessary for the various defendant school boards to be required to come up with new plans that will insure such results. As of now, based upon the record and the provisions of the existing plans, this Court concludes that the additional relief sought by the attorneys for the named plaintiffs and by the attorneys for the Government should not be granted, and their motions will thus be denied. This Court will, of course, retain jurisdiction over the cases for the entry of such additional orders as it may, from time to time, deem necessary and advisable.

Baton Rouge, Louisiana, January 7, 1969.

/s/ E. GORDON WEST
United States District Judge

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 26450 and 27303

LAWRENCE HALL, ET AL,
Plaintiffs-Appellants,

UNITED STATES OF AMERICA,
Intervenor-Appellant,

versus

ST. HELENA PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 1068)

JAMES WILLIAMS, JR., ET AL,
Plaintiffs-Appellants,

UNITED STATES OF AMERICA,
Intervenor-Appellant,

versus

IBERVILLE PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 2921)

YVONNE MARIE BOYD, ET AL,
Plaintiffs-Appellants,
UNITED STATES OF AMERICA,
Intervenor-Appellant,
versus
THE POINTE COUPEE PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 3164)

TERRY LYNN DUNN, ET AL,
Plaintiffs-Appellants,
UNITED STATES OF AMERICA,
Intervenor-Appellant,
versus
LIVINGSTON PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 3197)

DONALD JEROME THOMAS, ET AL,
Plaintiffs-Appellants,
versus
WEST BATON ROUGE PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 3208)

ROBERT CARTER, ET AL,
Plaintiffs-Appellants,

versus

WEST FELICIANA PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 3248)

SHARON LYNNE GEORGE, ET AL,
Plaintiffs-Appellants,

versus

C. WALTER DAVIS, PRESIDENT, EAST FELICIANA PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 3253)

WELTON J. CHARLES, JR., ET AL,
Plaintiffs-Appellants,

UNITED STATES OF AMERICA,
Intervenor-Appellant,

versus

ASCENSION PARISH SCHOOL BOARD, and GORDON WEBB,
Defendants-Appellees.

(Civil Action No. 3257)

Appeals from the United States District Court for the Eastern District of Louisiana

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 27054, 27087 and 27106

RICKEY DALE CONLEY, ET AL,
Plaintiffs-Appellants,

versus

LAKE CHARLES SCHOOL BOARD, ET AL,
Defendants-Appellees.
(Civil Action No. 9981)

URA BERNARD LEMON, ET AL,
Plaintiffs-Appellants,

UNITED STATES OF AMERICA,
Intervenor-Appellant,

versus

BOSSIER PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.
(Civil Action No. 10687)

MARCUS GORDON, ET AL,
Plaintiffs-Appellants,

versus

JEFFERSON DAVIS PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.
(Civil Action No. 10902)

ALFREDA TRAHAN, ET AL,
Plaintiffs-Appellants,
versus
LAFAYETTE PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.
(Civil Action No. 10903)

MARILYN MARIE MONTEILH, ET AL,
Plaintiffs-Appellants,
versus
ST. LANDRY PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.
(Civil Action No. 10912)

VIRGIE LEE VALLEY, ET AL,
Plaintiffs-Appellants,
UNITED STATES OF AMERICA,
Intervenor-Appellant,
versus
RAPIDES PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.
(Civil Action No. 10946)

JOANN GRAHAM, ET AL,
Plaintiffs-Appellants,
versus
EVANGELINE PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.
(Civil Action No. 11053)

JOHN ROBERTSON, ET AL,
Plaintiffs-Appellants,
versus
NATCHITOCHES PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.
(Civil Action No. 11054)

BERYL N. JONES, ET AL,
Plaintiffs-Appellants,
UNITED STATES OF AMERICA,
Intervenor-Appellant,
versus
CADDO PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.
(Civil Action No. 11055)

CATHERINE BATTISE, ET AL,
Plaintiffs-Appellants,
versus
ACADIA PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.
(Civil Action No. 11125)

JAMES H. HENDERSON, JR., ET AL,
Plaintiffs-Appellants,
versus
IBERIA PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.
(Civil Action No. 11126)

MARGARET M. JOHNSON, ET AL,
Plaintiffs-Appellants,

UNITED STATES OF AMERICA,
Intervenor-Appellant,

versus

JACKSON PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 11130)

JIMMY ANDREWS, ET AL,
Plaintiffs-Appellants,

versus

CITY OF MONROE SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 11297)

YVORNIA DECAROL BANKS, ET AL,
Plaintiffs-Appellants,

UNITED STATES OF AMERICA,
Intervenor-Appellant,

versus

CLAIBORNE PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 11304)

DOROTHY MARIE THOMAS, ET AL,
Plaintiffs-Appellants,

versus

ST. MARTIN PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 11314)

LINDA WILLIAMS, ET AL,
Plaintiffs-Appellants,

versus

MADISON PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 11329)

GWEN BOUDREAUX, ET AL,
Plaintiffs-Appellants,

versus

ST. MARY PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 11351)

IRMA J. SMITH, ET AL,
Plaintiffs-Appellants,

UNITED STATES OF AMERICA,
Intervenor-Appellant,

versus

CONCORDIA PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 11577)

VIRA CELESTAIN, ET AL,
Plaintiffs-Appellants,
versus
VERMILION PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 11908)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
versus
LINCOLN PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 12071)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
versus
RICHLAND PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 12169)

JEREMIAH TAYLOR, ET AL,
Plaintiffs-Appellants,
versus
OUACHITA PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 12171)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

BIENVILLE PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 12177)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

GRANT PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 12265)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

DE SOTO PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 12589)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

AVOYELLES PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 12721)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

EAST CARROLL PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 12722)

BILLY GENE MOORE, ET AL,
Plaintiffs-Appellants,

versus

WINN PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 12880)

ERIC CLEVELAND, ET AL,
Plaintiffs-Appellants,

versus

UNION PARISH SCHOOL BOARD, ET AL,
Defendants-Appellees.

(Civil Action No. 12924)

Appeals from the United States District Court for the Western District of Louisiana

No. 27391

JOYCE MARIE MOORE, ET AL,
Plaintiffs-Appellees,

versus

TANGIPAHOA PARISH SCHOOL BOARD, ET AL,
Defendants-Appellants.

(Civil Action No. 15556)

Appeal from the United States District Court for the Eastern District of Louisiana

(May 28, 1969)

Before BROWN, Chief Judge, GODBOLD, Circuit Judge and CABOT, District Judge

GODBOLD, Circuit Judge: We have before us appeals from three district court decrees covering thirty-six parish school systems and two city school systems, all in the state of Louisiana. These cases were submitted and argued April 21, 1969, two years after the en banc decision of this court in *Jefferson II*,[1] and

[1] United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966) [hereinafter, *Jefferson I*], *aff'd with modifications on rehearing en banc*, 380 F.2d 385 (5th Cir.) [hereinafter, *Jefferson II*], *cert. denied sub. nom.*, Caddo Parish Sch. Bd. v. United States, 389 U.S. 840, 19 L.Ed. 2d 103 (1967).

eleven months after the decision of the United States Supreme Court in *Green v. School Bd. of New Kent County*.[2] All of the school districts involved are under the uniform decree that *Jefferson II* required for school systems in the Fifth Circuit operating under freedom of choice plans.

I. Background

Twenty-nine of the districts are appellees in appeals from an en banc decision[3] of the District Court for the Western District of Louisiana, which declined to order modification, requested on the authority of *Green*, in existing desegregation plans.[4]

Eight parishes are appellees in similar appeals from a decree of the District Court for the Eastern District of Louisiana.[5]

The Tangipahoa Parish School Board is appellant in an appeal from another decree of the Eastern District[6]

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[2]Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 20 L.Ed. 2d 716 (1968).

[3]Conley v. Lake Charles Sch. Bd., 293 F. Supp. 84 (W.D. La. 1968).

[4]By order of January 9, 1969, without opinion, this court, after a poll of its members, denied the motion of appellants in the Western District cases that those cases be heard by the court en banc. Cleveland v. Union Parish Sch. Bd., 406 F.2d 1331 (5th Cir. 1969). The dissenting opinion to that order appears in 406 F.2d at 1333.

Both the Western District and the Eastern District cases were among those consolidated on appeal in Adams v. Mathews, 403 F.2d 181 (5th Cir. 1968).

[5]____ F. Supp. ____ (E.D. La. 1969).

[6]____ F. Supp. ____ (E.D. La. 1969).

directing it to change from a *Jefferson*-decree freedom of choice plan to one calling for the assignment of students "by adoption of geographic zones, or pairing of classes, or both."

We begin with principles both basic and familiar to all who are concerned with the complex problem of ending the dual school system in the South. There can be no doubt of the duty of school boards to act affirmatively to abolish all vestiges of state-imposed segregation of the races in the public schools. *United States v. Indianola Municipal Separate Sch. Dist.*, 5 Cir. 1969, ____ F.2d ____ [No. 25655, Apr. 11, 1969]; *Henry v. Clarksdale Municipal Separate Sch. Dist.*, 5 Cir. 1969 ____ F.2d ____ [No. 23255, Mar. 6, 1969]; *Adams v. Mathews*, 403 F.2d 181 (5th Cir. 1968); *Jefferson II, supra.*

The respective burdens and roles of school boards and district courts are articulated in *Green* itself:

> . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.
>
> The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the

> circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date," then the plan may be said to provide effective relief. Of course, where other, more promising courses of action are open to the board, that may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.

20 L.Ed. 2d at 724.

If under an existent plan there are no whites, or only a small percentage of whites, attending formerly all-Negro schools, or only a small percentage of Negroes enrolled in formerly all-white schools, then

the plan, as a matter of law, is not working. *Henry v. Clarksdale, supra; Adams v. Mathews, supra.*

The good faith of a school board in acting to desegregate its schools is a necessary concomitant to the achievement of a unitary school system, but it is not itself the yardstick of effectiveness.[7]

The majority of the school boards involved in these appeals did not begin any type of desegregation of their schools prior to being ordered to do so for the 1965-1966 school year.[8] All have been operating for the 1967-68 and 1968-69 school years under *Jefferson*-decree freedom of choice plans for pupil assignment, which under numerous decisions of this circuit are required to be uniform.

All now know, judges, lawyers and school boards, that freedom of choice, *Jefferson* variety or otherwise, is not a constitutional end in itself but only a means to the constitutionally required end of the termination of the dual school system. *Green, supra; Jefferson II, supra.* Since *Green* this court explicitly has rejected

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[7] "Here the district court found that the school board acted in good faith. But good faith does not excuse a board's noncompliance with its affirmative duty to liquidate the dual system. Good faith is relevant only as a necessary ingredient of an acceptable desegregation plan."
Henry v. Clarksdale Municipal Separate Sch. Dist., *supra* at ——— [Slip op. at 2].

[8] Twenty-two of the school boards were ordered to integrate their school systems beginning with the 1965-66 school year. Two boards commenced with the 1964-65 school year. Nine began in 1966-67, and five did not begin until the 1967-68 school year.

freedom of choice plans that were found to be demonstrably unsuitable for effectuating transition from dual school systems to unitary nondiscriminatory systems. *See, e.g., Anthony v. Marshall County Bd. of Educ.*, 5 Cir. 1969, ____ F.2d ____ [No. 26432, Apr. 15, 1969]; *United States v. Greenwood Municipal Separate School Dist.*, 406 F.2d 1086 (1969). *See also Graves v. Walton County Bd. of Educ.*, 403 F.2d 189 (5th Cir. 1968); *Bd. of Public Instruction of Duval County v. Braxton*, 402 F.2d 900 (5th Cir. 1968).

II. The Western District Cases

The Western District Court, sitting en banc, found that the operation of *Jefferson*-type freedom of choice in the school districts before it "has real prospects for dismantling the dual system at the earliest practicable date. . . ." and concluded that the best method available to eradicate the dual system of schools in these districts is freedom of choice.[9]

Appellants in the Western District cases contend that the statistical record manifestly reveals that the dual system continues and that freedom of choice has failed to produce meaningful results. They urge that the statistical record requires reversal when considered in light of *Green* and the cases in this circuit following *Green*.

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[9] "With every ounce of sincerity which we possess we think freedom of choice is the best plan available. We are not today going to jeopardize the success already achieved by casting aside something that is working and reach blindly into an experimental 'grab bag.'"
293 F. Supp. at 88.

The appellee school boards insist that *Green* does not foreclose the continuation of their *Jefferson*-decree freedom of choice plans. They read the statistics as revealing that progress, though in most instances statistically nominal, has been made toward the elimination of the dual system. They urge that the district court appropriately could conclude that the uniform *Jefferson*-decree freedom of choice plans under which they are operating do provide the effective relief referred to by *Green*, because, in the language of *Green*, they are operating in good faith and under plans which have real prospects for dismantling the state-imposed dual system "at the earliest practicable date." 20 L.Ed. 2d at 724.

We turn to the facts. In the Appendix to this opinion we set out the best statistical data made available to this court for the 1967-68 and 1968-69 school years, and such data as presently is available for 1969-70 (recognizing that the latter necessarily is not complete: *see* note 2. to the Appendix.) In the current school year, 1968-69, in every one of these school districts there is at least one all-Negro school, in most districts many more than just one.

In all of the twenty-nine districts, for the current school year, only two white students exercised their freedom of choice by electing to attend all-Negro schools. To the extent data is available for the 1969-70 school year, from choice forms already exercised and reported to us since oral argument of these cases, no

change of substantial consequence in this situation can be projected. *See* Appendix.

The number of Negro students attending formerly all-white schools has risen slightly since the adoption of the *Jefferson*-decree plans, but for the current school year the percentage this represents of the total Negro student population is minimal — only five of these twenty-nine systems have more than ten percent of their Negro children attending formerly all-white schools. Four parishes have less than one percent integration.

In no instance does the data made available to us for expected 1969-70 pupil assignment vary the situation existent for the current year sufficiently that compliance with constitutional standards can be projected.

We do not abdicate our judicial role to statistics. But when figures speak we must listen. It is abundantly clear that freedom of choice, as presently constituted and operating in the Western District school districts before us, does not offer the "real prospect" contemplated by *Green,* and "cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system." 20 L.Ed. 2d at 726-727.

In addition the boards are required to examine other alternatives. The presence of other and more promising courses of action at the least may indicate lack of good faith by the board and place a heavy burden on the board to explain its preference for an apparently

less effective method. *Green*, at 20 L.Ed. 2d 724. If there are reasonably available other ways promising speedier and more effective conversion to a unitary non-racial system, freedom of choice must be held unacceptable. *Id.* at 725. *Anthony v. Marshall County, supra; United States v. Greenwood, supra.*

We reverse and remand these cases to the district court in order that a new plan may be put into effect in each school district. The obligation is upon the school boards to come forward with realistic and workable plans, and the assessment and initial review and approval or rejection of each plan is for the district court, not for this court, removed as we are from "the circumstances present and the options available in each [of twenty nine] instance[s]." *Green, supra,* 20 L.Ed. 2d at 724; *Anthony v. Marshall County, supra; United States v. Greenwood, supra; Adams v. Mathews, supra; Bd. of Public Instruction of Duval County v. Braxton, supra; Henry v. Clarksdale, supra.*[10] This is

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[10]See the concurring opinion of Judge Rubin in *Duval County*:

> "*Green* emphasizes that school officials have a continuing duty to take whatever action may be necessary to provide 'prompt and effective disestablishment of a dual system.' If one method is ineffective, they are to try another. Hence, no single plan is or can be judicially approved as a catholicon.
>
> "*Brown I* and all of its successors, as well as *Green, Monroe,* and *Raney,* contemplate that school plans will be prepared by local officials and school boards, not by courts. But if local officials fail to assume their responsibilities under the Constitution, district courts must continue to attempt to formulate the plans that should be prepared by school officials based on their expert knowledge, training and skill." (Citations omitted.)

402 F.2d at 908.

not to say that the district court on the scene may not, if it thinks best, require a uniform approach by all districts.[11]

There are many methods and combinations of methods available for consideration, either on a district-by-district basis or on a uniform basis if the district court so directs. Some of these are geographic zoning if it tends to disestablish the dual system, *Davis v. Bd. of School Comm. of Mobile, Ala.*, 393 F.2d 690 (5th Cir. 1968),[12] pairing of grades or of schools, educational clusters or parks, discontinuance of use of substandard buildings and premises, rearrangement of transportation routes, consolidation of schools, appropriate location of new construction, and majority-to-minority transfers. The resources of the Educational Resources Center for School Desegregation at New Orleans, are available to the boards and may be utilized.[13] We set out in the margin the approach re-

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[11] *See, e.g.* the discussion of Whittenberg v. Greenville County School District, (D.C. S.C., March 31, 1969), at note 14, *infra*, and accompanying text.

[12] But a plan which contributes toward preserving segregated schools by incorporating zones corresponding to racially separate residential patterns is unacceptable. United States v. Indianola, *supra*.

[13] At least two district judges in Louisiana have ordered the use of the facilities of this center. Tangipahoa Parish, before us on this appeal, was ordered on October 15, 1968 to produce a plan for the 1969-70 school year for unitary operation of its school system. When the school board informed the court that it was unable to find a plan better than the one in existence, the court appointed the Center to prepare a plan. A hearing has not yet been held on whether the Center's plan will be adopted.

In Harris v. St. John the Baptist Parish Sch. Bd., Civ. No. 13212 (E.D. La. Apr. 23, 1969), the school board, after it did

cently taken by the United States District Court for the District of South Carolina, sitting en banc in *Whittenberg v. Greenville County School District*, ____ F. Supp. ____ (D.C. S.C. March 31, 1969) a case concerning 22 of the 93 school districts in South Carolina.[14]

We are urged by appellants to order on a plenary basis for all these school districts that the district court must reject freedom of choice as an acceptable ingredient of any desegregation plan. Unquestionably as now constituted, administered and operating in these districts freedom of choice is not effectual. The Supreme Court in *Green* recognized the general ineffectiveness of freedom of choice.[15] But in that case,

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not come up with a plan of its own, was ordered to consult with the Center. A hearing was set on the Center's plan. The board came in with two plans of its own. The district judge accepted one of the board's plans, which incorporated some of the Center's suggestions.

[14]The district court directed that all school districts submit to the Office of Education, HEW, their existing method of operation, along with any changes proposed by them, and to seek to develop in conjunction with HEW an acceptable plan of operation "conformable to the constitutional rights of the plaintiffs . . . and consonant in timing and method with the practical and administrative problems faced by the particular districts." If a plan is agreed upon by the school district and HEW, the South Carolina district court will approve it unless the plaintiffs show it does not meet constitutional standards. If the school district already is operating under a plan approved by HEW, it will be adopted by the court absent a showing of constitutional infirmity. If no agreed plan is developed, the court will hold a hearing and enter its decree, considering the respective proposed plans of the district, the plaintiffs, and HEW.

[15]The Supreme Court said: "[T]he general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation." 20 L.Ed. 2d at 725.

See also the opinion of District Judge Heebe in Moses v.

Washington Parish School Board, 276 F. Supp. 834 at 851-852 (E.D. La. 1967):

"If this Court must pick a method of assigning students to schools within a particular school district, barring very unusual circumstances, we could imagine no method more inappropriate, more unreasonable, more needlessly wasteful in every respect, than the so-called 'free-choice' system.

"Under such a system the school board cannot know in advance how many students will choose any school in the system — it cannot even begin to estimate the number. The first principle of pupil assignment in the scheme of school administration is thus thwarted; the principle ought to be to utilize all available classrooms and schools to accommodate the most favorable number of students; instead, this aim is surrendered in order to introduce an element of 'liberty' (never before part of efficient school administration) on the part of the students in the choice of their own school. Obviously there is no constitutional 'right' for any student to attend the public school of his own choosing. But the extension of the *privilege* of choosing one's school, far from being a 'right' of the students, is not even consistent with sound school administration. Rather, the creation of such a choice only has the result of demoralizing the school system itself, and actually depriving every student of a good education.

"Under a 'free-choice' system, the school board cannot know or estimate the number of students who will want to attend any school, or the identity of those who will eventually get their choice. Consequently, the board cannot make plans for the transportation of students to schools, plan curricula, or even plan such things as lunch allotments and schedules; moreover, since in no case except by purest coincidence will an appropriate distribution of students result, and each school will have either more or less than the number it is designed to efficiently handle, many students at the end of the free-choice period have to be reassigned to schools other than those of their choice — this time on a strict geographical-proximity basis, see the *Jefferson County* decree, thus burdening the board, in the middle of what should be a period of

concerning only a single district having only two schools, the court declined to hold "that 'freedom of choice' can have no place in . . . a plan" that provides effective relief, and recognized that there may be instances in which freedom of choice may serve as an effective device, and remanded to the district court with directions to require the board to formulate a new plan.[16]

While we have directed most of our discussion to pupil assignment, integration of faculty is of equal importance, and the boards must come forward with affirmative plans in that regard. "[T]he school board must do everything within its power to recruit and reassign teachers so as to provide for a substantial degree of faculty integration," which includes withholding of teacher contracts if necessary, *United States v. Indianola, supra; United States v. Greenwood, supra.* The pattern of teacher assignments to a particular school must not be identifiable as tailored for a heavy

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firming up the system and making final adjustments, with the awesome task of determining which students will have to be transferred and which schools will receive them. Until that final task is completed, neither the board nor any of the students can be sure of which school they will be attending; and many students will in the end be denied the very 'free choice' the system is supposed to provide them." (Emphasis in original.)

[16] *See* Davis v. Mobile County, *supra,* in which this court required a zone plan for urban areas but left freedom of choice in effect in rural areas. *See also* the dissenting opinion to the denial of en banc hearing in the instant cases, 406 F.2d at 1338-39: "I am not suggesting that freedom of choice should necessarily be abandoned in favor of zoning. . . . There is nothing necessarily unconstitutional about freedom of choice or geographic zoning or a combination of the two."

concentration of either Negro or white students. *Davis v. Mobile County, supra; United States v. Greenwood, supra; United States v. Indianola, supra.*

Also a plan which will "effectuate a transition to a racially nondiscriminatory school system" must include effectual provisions concerning staff, facilities, transportation and school activities — the entire school system.

III. The Eastern District cases

In the Eastern District cases the district judge concluded that freedom of choice was working well and was the best available method for the school boards to reach their constitutional obligations.

Appellants and the school boards make the same contentions in these cases as were made in the Western District cases. Again, the statistical evidence makes abundantly clear that the freedom of choice plans as presently constituted, administered and operating, are failing to eradicate the dual system. *See* Appendix. For the current year not one of these districts has as many as ten percent of its Negro students enrolled in formerly all-white schools. The 1969-70 data shows that Iberville Parish has achieved ten percent, up from 9.2% for the current year. In all these districts no white student chose to attend an all-Negro school in the current year, and none has chosen an all-Negro school for 1969-70. Forty-six all-Negro schools exist in these parishes in 1968-69. As in the Western District, the

partial 1969-70 data supplied to this court does not indicate any real chance of attainment of constitutional standards in 1969-70. The boards must adopt new plans.

In addition, in evaluating the plans before him the district judge did not apply the standard of whether the plans are working but rather that of whether they could work. This is an erroneous standard. When testing the sufficiency of a plan that has been in operation sufficiently long to produce meaningful empirical data, that data must be considered and a determination made of whether the plan is effectuating a transition to a racially non-discriminatory school system. And *Green* requires the district judge to weigh the existing plan in the light both of the facts at hand and of any alternatives which may be shown as feasible and more promising. The district court must consider the alternatives.

Also the district court erred in holding that segregation which continues to exist after the exercise of unfettered free choice is "de facto" segregation and as such constitutionally permissible.

These cases must be reversed and remanded under the same directions as the Western District cases.

IV. The Tangipahoa Parish case

Pursuant to *Green* the district court required the Tangipahoa School Board to present a new plan to replace the existing freedom of choice plan which on

October 15, 1968 it found to be ineffective. The court conducted hearings, similar to those now mandated to be held in the Western District and for the other Eastern District cases, and approved a new plan. This court has said repeatedly what we say in this opinion, that the responsibility for structuring and administering existing and new plans for disestablishing the dual system is upon the school boards and the administrators, and the primary responsibility for assessing and reviewing the plan and adopting necessary changes is upon the district court on the scene rather than at the appellate level. In the *Tangipahoa* case the district court correctly applied this policy, after a review of the facts. We affirm its decision.

V

Moore v. Tangipahoa Parish, No. 27391, is AFFIRMED. All other cases are REVERSED and REMANDED to the district courts with the following instructions.

(a) These cases shall receive the highest priority.

(b) No later than thirty days from the date of the mandate each school board shall submit to the district court a proposed new plan for its school district to be effective with the commencement of the 1969-70 school term. Provided, however, if the district court desires to require a uniform type of plan, or a uniform approach to the formulation of plans, or issue instructions to the boards of methods that it will or will not consider, or other appropriate instructions, it shall enter its order

to that effect within ten days of the date of the mandate. If the district court enters such an order the maximum time for filing plans shall be thirty days from the date of such order.

(c) The parties shall have ten days from the date a plan is filed with the district court to file objections or suggested amendments thereto.

(d) For plans as to which objections are made or amendments suggested, or which in any event the district court will not approve without hearing, the district court shall commence hearings beginning no later than ten days after the time for filing objections has expired.

(e) New plans for all districts effective for the beginning of the 1969-70 school term shall be completed and approved by the district courts no later than July 25, 1969.

Because of the urgency of formulating and approving plans to be effective for the 1969-70 school term it is ordered as follows. The mandate of this court shall issue immediately. This court will not extend the time for filing petitions for rehearing or briefs in support of or in opposition thereto. Any appeals from orders or decrees of the district court on remand shall be expedited. Any appeal may be on the original record. The record on any appeal shall be lodged with this court and appellant's brief filed, all within thirty days of the date of the order or decree of the district court from which the appeal is taken.

APPENDIX

School System	Total Number Negro	Total Number White	No. of Negro in Formerly White Schools	%	% Change	No. of Whites in Formerly Negro Schools	%
No. 27087, 27054 27106 Western District							
Acadia							
1967-68	N.A.[1]	—	—	2.2		1	N.A.
1968-69	2694	8930	149	5.5	+3.3	0	0
1969-70[2]	2062	8199	190	9.2	+3.7	0	0
Avoyelles							
1967-68	3249	5909	203	6.25		0	0
1968-69	3407	5982	410	12.03	+5.78	0	0
1969-70	N.A.	—	—	—	—	—	—
Bienville							
1967-68	2429	1760	55	2.26		0	0
1968-69	2580	1944	60	2.33	+.07	0	0
1969-70	2487	1865	81	3.25	+.92	0	0
Bossier							
1967-68	4249	12,760	137	3.22		0	0
1968-69	4268	13,949	188	4.4	+1.18	1	.007
1969-70	3726	13,408	286	7.67	+3.27	0	0
Caddo							
1967-68	24,700	33,044	396	1.6		1	.003
1968-69[*]	25,414	33,879	642	2.5	+.9	1	.003
1969-70	22,600	32,002	1113	4.9	+2.4	158	.49
Calcasieu							
1967-68	N.A.	—	—	7.6		N.A.	—
1968-69	9787	28,758	956	9.8	+2.2	0	0
1969-70	N.A.	—	—	—	—	—	—

[1]Not available. This signal followed by dashes in adjoining columns means figures for all such columns are unavailable.

[2]The 1969-70 figures for all school systems, where shown, are based upon the incomplete results of the latest choice period (March 1, 1969 to April 1, 1969). They are not intended to be a completely accurate forecast of the racial make-up of the schools involved for 1969-70. At oral argument of these cases the parties were directed to furnish this information to the court to the extent possible, and in most instances they have done so.

[*]In this parish there are minor discrepancies between those figures collated by the appellants and those by the United States. The differences are nominal and do not impel a different conclusion on any issue in the case. We use appellants' figures.

Total No. of Negro Teachers	Total No. of White Teachers	CROSSOVERS				Total No. of Schools in System	STUDENTS		FACULTY	
		No. of Negro Teachers in Formerly White Schools	%	No. of White Teachers in Formerly Negro Schools	%		No. of Schools with All-Negro Students	No. of Schools with All-White Students	No. of Schools with All-Negro Faculty	No. of Schools with All-White Faculty
N.A.	—	—	—	—	—	N.A.	—	—	—	—
127	389	23	18.1	12	3.08	22	4	9	—	6
140[3]	357	41	29.28	12	3.36	22	4	8	0	0
126	293	6	4.76	3	1.02	N.A.	—	—	—	—
126	317	8	6.35	9	2.84	17	3	1	0	6
N.A.	—	—	—	—	—	N.A.	—	—	—	—
118	104	7	5.93	4	4.04	N.A.	—	—	—	—
133[4]	121	13	10.11	13	10.67	11	5	0	0	0
N.A.	—	—	—	—	—	11	5	2	N.A.	—
212	551	14	6.6	7	1.27	N.A.	—	—	—	—
213	614	33	15.49	22	3.58	24	5	5	0	1
N.A.[5]	—	—	—	—	—	25	6	2	N.A.	—
1117	1418	15	1.34	7	.49	N.A.	—	—	—	—
1099	1408	96	8.73	66	4.68	77	26	15	0	2
N.A.[7]	—	—	—	—	—	76	27	10	N.A.	—
N.A.	—	—	—	—	—	N.A.	—	—	—	—
417	1,379	31	7.4	28	2.03	73	21	13	16	34
N.A.	—	—	—	—	—	N.A.	—	—	—	—

[3]Figures given for faculty cross-overs for 1969-70 in all school systems, where shown, represent only the planned or tentative assignments as reported to the court by the school boards since oral argument.

[4]Fractions have been dropped from teacher cross-over figures, with no attempt to round off the figure.

[5]In a report filed in the district court February 27, 1967, a copy of which has been filed with this court pursuant to our oral order for additional data, the Bossier Parish School Board states that it has set as a minimum goal for 1969-70 a 100% increase in faculty integration.

[7]In a report filed in the district court on February 21, 1969 Caddo Parish states it has a goal of increasing faculty cross-overs by 50% for the 1969-70 school year.

School System ⇦	Total Number Negro	Total Number White	No. of Negro in Formerly White Schools	%	% Change	No. of Whites in Formerly Negro Schools	%
City of Monroe							
1967-68	5249	5775	22	.4		0	0
1968-69	4952	5703	54	1.0	+.6	0	0
1969-70	N.A.	—	—	—	—	—	—
Claiborne							
1967-68	2362	1695	24	1.02		0	0
1968-69	2334	1704	23	.99	—.03	0	0
1969-70	N.A.	—	—	—	—	—	—
Concordia							
1967-68	3240	3767	32	.99		0	0
1968-69	3189	3767	37	1.16	+.17	0	0
1969-70	N.A.	—	—	—	—	—	—
De Soto							
1967-68	3951	2487	26	.66		0	0
1968-69	3768	2430	34	.90	+.24	0	0
1969-70	3720	2432	36	.96	+.02	0	0
East Carroll							
1967-68	2611	1482	106	4.06		0	0
1968-69	2627	1479	133	5.06	+1.0	0	0
1969-70	2049	1439	124	6.05	+ .99	0	0
Evangeline							
1967-68	N.A.	—	—	2.9		0	0
1968-69	3114	5624	71	2.3	—.6	0	0
1969-70	N.A.	—	58	—		1	—

Total No. of Negro Teachers	Total No. of White Teachers	CROSSOVERS				Total No. of Schools in System	STUDENTS		FACULTY	
		No. of Negro Teachers in Formerly White Schools	%	No. of White Teachers in Formerly Negro Schools	%		No. of Schools with All-Negro Students	No. of Schools with All-White Students	No. of Schools with All-Negro Faculty	No. of Schools with All-White Faculty
214	253	4	1.86	1	.39	18	5	6	5	7
215	264	25	11.6	27	10.2	18	6	2	0	0
N.A.	—	—	—	—	—	N.A.	—	—	—	—
115	102	0	0	8	7.84	N.A.	—	—	—	—
112	108	0	0	8	7.41	10	5	2	1	5
N.A.	—	—	—	—	—	N.A.	—	—	—	—
147	184	2	1.36	4	2.17	N.A.	—	—	—	—
160	184	14	8.75	13	7.05	12	4	4	0	0
N.A.	—	—	—	—	—	N.A.	—	—	—	—
193	154	8	4.15	7	4.55	N.A.	—	—	—	—
184	136	14	7.61	14	10.29	14	7	4	0	0
N.A.	—	—	—	—	—	N.A.	—	—	—	—
109	84	4	3.67	5	5.95	N.A.	—	—	—	—
97	83	4	4.12	7	8.43	9	5	2	0	2
N.A.	—	—	—	—	—	9	5	0		
N.A.	—	—	—	—	—	N.A.	—	—	—	—
142	274	19	13.38	12	4.3	14	5	2	N.A.	—
N.A.	—	—	—	—	—	N.A.	—	—	—	—

•In its report to the district court in February, the East Carroll School Board states it has plans to increase faculty integration by approximately 100% in 1969-70.

School System	Total Number Negro	Total Number White	No. of Negro in Formerly White Schools	%	% Change	No. of Whites in Formerly Negro Schools	%
Grant							
1967-68	943	2405	48	5.09		0	0
1968-69	1061	2676	39	3.68	−1.41	0	0
1969-70	N.A.	—	—	—	—	—	—
Iberia							
1967-68	N.A.	—	—	6.2		0	0
1968-69	4897	10,070	426	8.7	+2.5	0	0
1969-70	N.A.	—	—	—	—	—	0
Jackson							
1967-68	1525	2354	78	5.11		0	0
1968-69*	1564	2317	83	5.31	+.2	0	0
1969-70	1581	2278	82	5.18	−.13	0	0
Jefferson Davis							
1967-68	N.A.	—	—	8.3		0	0
1968-69	2069	5976	270	13.0	+4.7	0	0
1969-70	N.A.	—	280	N.A.	—	—	—
Lafayette							
1967-68	N.A.	—	—	10.0		0	0
1968-69	6984	20,311	1,195	17.0	+7.0	0	0
1969-70	6533	21,011	1539	23.5	+6.5	2	.00009
Lincoln							
1967-68	3126	3630	96	3.07		0	0
1968-69	3139	3682	116	3.70	+.63	0	0
1969-70	—	N.A.	—	—	—	—	—

*In this parish there are minor discrepancies between those figures collated by the appellants and those by the United States. The differences are nominal and do not impel a different conclusion on any issue in the case. We use appellants' figures.

Total No. of Negro Teachers	Total No. of White Teachers	CROSSOVERS				Total No. of Schools in System	STUDENTS		FACULTY	
		No. of Negro Teachers in Formerly White Schools	%	No. of White Teachers in Formerly Negro Schools	%		No. of Schools with All-Negro Students	No. of Schools with All-White Students	No. of Schools with All-Negro Faculty	No. of Schools with All-White Faculty
49	127	0	0	0	0	N.A.	—	—	—	—
51	138	3	5.88	4	2.90	8	2	4	0	4
N.A.	—	—	—	—	—	N.A.	—	—	—	—
N.A.	—	—	—	—	—	N.A.	—	—	—	—
231	430	24	5.58	2	4.65	30	11	4	9	7
N.A.	—	—	—	—	—	N.A.	—	—	—	—
84	124	8	9.52	7	5.64	N.A.	—	—	—	—
81	128	8	9.87	8	5.25	11	4	2	0	0
N.A.	—	—	—	—	—	11	4	2	N.A.	—
N.A.	—	—	—	—	—	N.A.	—	—	—	—
110	287	11	10.0	2	.69	19	5	1	3	2
N.A.	—	—	—	—	—	N.A.	—	—	—	—
N.A.	—	—	—	—	—	N.A.	—	—	—	—
283	911	45	15.9	28	3.07	35	10	4	1	0
N.A.	—	—	—	—	—	36	9	2	N.A.	—
133	174	5	3.76	7	4.02	N.A.	—	—	—	—
142	182	16	11.74	17	9.34	19	9	4	2	1
N.A.	—	—	—	—	—	N.A.	—	—	—	—

School System	Total Number Negro	Total Number White	No. of Negro in Formerly White Schools	%	% Change	No. of Whites in Formerly Negro Schools	%
Madison							
1967-68	N.A.	—	—	2.4		0	0
1968-69	3235	1255	83	2.6	+.2	0	0
1969-70	2929	1202	91	3.1	+.5	0	0
Natchitoches							
1967-68	N.A.	—	—	2.1		N.A.	—
1968-69	4601	4327	101	2.2	+.1	N.A.	—
1969-70	N.A.	—	—	—	—	—	—
Ouachita							
1967-68	4858	12,801	47	.9		0	0
1968-69	4831	13,044	79	1.6	+.7	0	0
1969-70	4071	12,392	102	2.5	+.9	1	.0008
Rapides							
1967-68	9168	17,712	302	3.29		0	0
1968-69	9671	18,856	402	4.3	+1.01	0	0
1969-70	N.A.	—	—	—	—	—	—
Richland							
1967-68	3260	3260	11	.34		0	0
1968-69	3112	3354	28	.90	+ .56	0	0
1969-70	3497	3340	77	2.2	+1.3	0	0
St. Landry							
1967-68	N.A.	—	—	3.0	—	0	0
1968-69	10,754	11,779	330	3.0	.0	0	0
1969-70	N.A.	—	—	—	—	—	—

Total No. of Negro Teachers	Total No. of White Teachers	CROSSOVERS				Total No. of Schools in System	STUDENTS		FACULTY	
		No. of Negro Teachers in Formerly White Schools	%	No. of White Teachers in Formerly Negro Schools	%		No. of Schools with All-Negro Students	No. of Schools with All-White Students	No. of Schools with All-Negro Faculty	No. of Schools with All-White Faculty
N.A.	—	—	—	—	—	N.A.	—	—	—	—
137	81	5	3.64	13	16.04	8	5	0	0	1
N.A.	—	9	—	19	—	8	5	0	0	0
N.A.	—	—	—	—	—	N.A.	—	—	—	—
247	301	29	11.74	33	10.96	26	10	7	N.A.	—
N.A.	—	—	—	—	—	N.A.	—	—	—	—
200	542	7	3.5	1	.018	37	12	15	10	23
N.A.	—	—	—	—	—	37	12	13	N.A.	—
						36	10	12	N.A.	—
409	766	5	1.22	3	.39	N.A.	—	—	—	—
392	786	19	4.84	23	2.92	51	19	16	4	5
N.A.	—	—	—	—	—	N.A.	—	—	—	—
139	168	0	0	0	0	N.A.	—	—	—	—
150	175	11	7.33	11	6.76	14	8	2	0	0
N.A.	—	—	—	—	—	14	8	1	N.A.	—
N.A.	—	—	—	—	—	N.A.	—	—	—	—
484	547	23	4.75	21	3.83	43	20	3	N.A.	—
N.A.	—	—	—	—	—	N.A.	—	—	—	—

School System	Total Number Negro	Total Number White	No. of Negro in Formerly White Schools	%	% Change	No. of Whites in Formerly Negro Schools	%
St. Martin							
1967-68	N.A.	—	—	3.2		0	0
1968-69	3516	4871	128	3.6	+ .4	0	0
1969-70	3633	5178	195	5.36	+1.76	0	0
St. Mary							
1967-68	N.A.	—	467	11.7	—	0	0
1968-69	5390	10,537	729	13.5	+1.8	0	0
1969-70	5137	10,283	977	19.01	+5.51	0	0
Union							
1967-68	2058	2558	9	.4		0	0
1968-69	2098	2589	14	.6	+ .2	0	0
1969-70	1855	2588	35	1.8	+1.2	0	0
Vermilion							
1967-68	N.A.	—	—	19.5		0	0
1968-69	1644	8138	722	44.0	+24.5	0	0
1969-70	1493	7862	686	45.9	+ 1.9	0	0
Winn							
1967-68	1528[11]	2402	58	3.8		0	0
1968-69	1520	2392	69	4.5	+.7	0	0
1969-70	1400	2256	73	5.2	+.7	0	0

[11]Statistics on student integration in 1967-68 in Winn Parish appear to be derived from choice form reports to the district court dated September 8, 1967. They do not necessarily represent the number of students attending integrated schools during that year.

Total No. of Negro Teachers	Total No. of White Teachers	CROSSOVERS				Total No. of Schools in System	STUDENTS		FACULTY	
		No. of Negro Teachers in Formerly White Schools	%	No. of White Teachers in Formerly Negro Schools	%		No. of Schools with All-Negro Students	No. of Schools with All-White Students	No. of Schools with All-Negro Faculty	No. of Schools with All-White Faculty
N.A.	—	—	—	—	—	N.A.	—	—	—	—
161	215	15	9.3	8	3.7	15	7	1	3	1
N.A.	—	19	—	11	—	15	7	1	2	0
N.A.	—	—	—	—	—	N.A.	—	—	—	—
246	455	52	11.1	12	2.63	26	9	1	2	N.A.
N.A.	—	—	—	—	—	27	9	1	N.A.	—
86	140	N.F.T.[9]	—	N.F.T.	—	9	2	5	N.A.	—
91	134	17	18.5	12	8.9	9	2	4	N.A.	—
N.A.	—	20	—	20	—	9	1	3	N.A.	—
N.A.	—	—	—	—	—	N.A.	—	—	—	—
62	371	23	37.0	3	.8	18	1	2	0	1
74	375	39	52.7	5[10]	1.3	18	1	2	0	0
65	134	0	0	0	0	12	4	4	4	8
68	140	7	10.3	3	2.1	12	4	3	3	1
N.A.	—	—	—	—	—	12	4	3	N.A.	—

[9]1967-68 reports of school board to the district court show that no teacher served full time in a cross-over situation. 1968-69 reports do not distinguish between full and part-time teachers.

[10]Vermilion Parish has only one remaining school in which Negroes are predominant. That school is all-Negro.

School System	Total Number Negro	Total Number White	No. of Negro in Formerly White Schools	%	% Change	No. of Whites in Formerly Negro Schools	%
No. 26450 & 27303 Eastern District							
St. Helena							
1967-68	1917	1085	60	3.1		0	0
1968-69	1954	1073	71	3.6	+.5	0	0
1969-70	2019	1079	57	2.8	—.8	0	0
Iberville							
1967-68	4850	3459	370	7.3		0	0
1968-69	4882	3464	448	9.2	+1.9		0
1969-70	4763	3508	477	10.0	+ .8	0	0
Livingston							
1967-68	1486	7739	12	0.8		0	0
1968-69	1530	8255	7	0.45	—0.35	0	0
1969-70	N.A.	—	4	—	—	0	0
Pointe Coupee							
1967-68	3476	2270	233	6.7		0	0
1968-69	3700	2346	168	4.5	—2.2	0	0
1969-70	3340	2505	182	5.4	+.9	0	0
Ascension							
1967-68	3190	5776	58	1.8		0	0
1968-69	2368	6245	101	4.3	+2.5	0	0
1969-70	2952	6464	161	5.45	+1.15	0	0
West Baton Rouge							
1967-68	N.A.	—	126	N.A.		0	0
1968-69	2442	2419	143	5.8	N.A.	0	0
1969-70	1576	2199	144	9.1	+3.3	0	0

Total No. of Negro Teachers	Total No. of White Teachers	CROSSOVERS				Total No. of Schools in System	STUDENTS		FACULTY	
		No. of Negro Teachers in Formerly White Schools	%	No. of White Teachers in Formerly Negro Schools	%		No. of Schools with All-Negro Students	No. of Schools with All-White Students	No. of Schools with All-Negro Faculty	No. of Schools with All-White Faculty
89	61	6	6.7	3	4.9	N.A.	—	—	—	—
97	68	6	6.1	2	2.9	11	7	2	5	1
N.A.	—	—	—	—	—	11	7	2	N.A.	—
211	179	5	2.4	2	1.1	N.A.	—	—	—	—
232	196	17	7.3	20	10.2	17	9	0	1	1
N.A.	—	—	—	—	—	17	9	0	N.A.	—
73	367	0	0	0	0	N.A.	—	—	—	—
110	363	36	32.7	4	1.1	24	4	19	2	1
N.A.	—	—	—	—	—	N.A.	—	—	—	—
149	112	5	3.4	4	3.6	N.A.	—	—	—	—
151	116	11	7.3	10	8.6	10	5	0	0	0
N.A.	—	—	—	—	—	10	5	0	N.A.	—
161	258	5	3.1	2	0.77	N.A.	—	—	—	—
131	269	16	12.2	11	4.1	12	5	2	0	0
N.A.	—	—	—	—	—	13	6	0	N.A.	—
N.A.	—	—	—	—	—	N.A.	—	—	—	—
125	125	24	19.2	26	20.8	9	5	1	N.A.	—
N.A.	—	—	—	—	—	8	4	1	N.A.	—

School System	Total Number Negro	Total Number White	No. of Negro in Formerly White Schools	%	% Change	No. of Whites in Formerly Negro Schools	%
West Feliciana							
1967-68	1856	844	140	5.0		0	0
1968-69	1760	734	119	6.7	+1.7	0	0
1969-70	1707	759	112	6.5	— .2	0	0
East Feliciana							
1967-68	2930	1320	33	1.0		0	0
1968-69	2912	1396	52	1.7	+.7	0	0
1969-70	2934	1381	78	2.65	+.95	0	0
No. 27391 Eastern District							
Tangipahoa							
1967-68	N.A.	—	—	—	—	—	—
1968-69	N.A.	—	—	—	—	—	—
1969-70	N.A.	—	—	—	—	—	—

Total No. of Negro Teachers	Total No. of White Teachers	CROSSOVERS				Total No. of Schools in System	STUDENTS		FACULTY	
		No. of Negro Teachers in Formerly White Schools	%	No. of White Teachers in Formerly Negro Schools	%		No. of Schools with All-Negro Students	No. of Schools with All-White Students	No. of Schools with All-Negro Faculty	No. of Schools with All-White Faculty
80	46	2	2.5	1	2.2	7	5	0	3	0
85	44	3	3.5	1	2.3	6	4	1	3	0
N.A.	—	—	—	—	—	6	4	1	N.A.	—
N.A.	—	—	—	—	—	11	7	1	N.A.	—
135	81	4	2.9	5	6.2	11	7	1	4	1
N.A.	—	—	—	—	—	11	7	0	N.A.	—
N.A.	—	—	—	—	—	N.A.	—	—	—	—
N.A.	—	—	—	—	—	N.A.	—	—	—	—
N.A.	—	—	—	—	—	N.A.	—	—	—	—

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 466

ST. HELENA PARISH SCHOOL BOARD, ET AL.,
PETITIONERS

v.

LAWRENCE HALL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C 97–139) is not yet reported. The opinion of the United States District Court for the Western District of Louisiana (Pet. App. B 69–81) is reported at 293 F. Supp. 84; *Moore* v. *Tangipahoa Parish School Board* is reported at 298 F. Supp. 283 (E.D. La.); the remaining decision from the Eastern District of Louisiana (Pet. App. B 82–96) is reported.

JURISDICTION

The judgment of the court of appeals was entered, pursuant to the terms of the opinion (Pet. App. C

364-374—69

124), on May 28, 1969. The petition for certiorari was filed August 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in holding unlawful the freedom of choice method of student assignment and faculty desegregation plans based on voluntary transfers in these school districts, and requiring the submission of new desegregation plans.

STATEMENT

1. The 18 cases to which the United States is a party are school desegregation suits brought here from a decision of the United States Fifth Circuit Court of Appeals reversing [1] district court orders approving the continued use of desegregation plans based upon freedom of choice.[2]

None of the school districts involved took any steps toward desegregation pursuant to the decisions in *Brown* v. *Board of Education,* 347 U.S. 483, 349 U.S. 294, until ordered to do so by federal district courts. In 1967 each of these school districts was required to

[1] In one case, *Moore* v. *Tangipahoa Parish School Board*, No. 27,391, the district court had ruled out free choice and the court of appeals affirmed that decision. See Pet. App. C 122–123; 298 F. Supp. 283 (E.D. La.). (The district court opinion is not reproduced in the petition for certiorari.)

[2] The Fifth Circuit had appeals in 38 cases pending before it. Six cases decided in the district court on the basis of the Fifth Circuit's decision in these cases, those involving the West Carroll, Morehouse, Catahoula, Sabine, Calcasieu and Webster Parish School Boards, were not appealed to the Fifth Circuit, although included in the petition for certiorari, are not now properly before this Court.

implement a free choice plan for the 1967–1968 school year based on the model decree set forth in *United States* v. *Jefferson County Board of Education,* 380 F. 2d 385 (C.A. 5) (*en banc*), certiorari denied *sub nom. Caddo Parish School Board* v. *United States,* 389 U.S. 840.

Motions for supplemental relief in conformity with the decisions of this Court in *Green* v. *County School Board,* 391 U.S. 430, and its companion cases, were filed in June and July, 1968. The district courts continued hearings commenced in July on these motions until November 1968; and the United States and private plaintiffs took appeals to the Fifth Circuit Court of Appeals, seeking summary reversal of the district courts' failure to order the implementation of new plans for the 1968–1969 school year. The court of appeals declined to reverse but, rather, ordered the district courts to hold expedited hearings on the pending *Green* motions with a view to determining whether freedom of choice was adequate to convert these dual school systems based on race to unitary, non-racial systems. *Adams* v. *Mathews,* 403 F. 2d 181 (C.A. 5). In all but the *Tangipahoa Parish* case, the district courts for the Eastern and Western Districts of Louisiana found for defendant school boards and denied the relief sought by the government and private plaintiffs. The parties plaintiff appealed to the court of appeals which reversed, and the school boards seek review of that decision by this Court.

2. The 18 school districts involved operated racially dual school systems until they were brought into litigation. Prior to the judicial imposition of free choice

plans, students in these districts were assigned to schools substantially on the basis of white and Negro geographic attendance units. After two years of operation under *Jefferson*-type free choice plans, in the 13 school districts in the Western District of Louisiana, during the 1968–1969 school year, approximately 97 per cent of the Negro students attended 104 virtually all-Negro schools. In all but one of these school systems, less than five per cent of the Negro students attended the traditionally white schools—the exception being Avoyelles Parish, where 12 per cent of the Negro students attended desegregated schools. The proportion of teachers assigned in 1968–1969 to faculties in which their race was a minority did not exceed ten per cent in any of these 13 school districts, and in most of the districts it was far less. No white students attended traditionally Negro schools, except for one white student in each of two parishes—Bossier and Caddo.

In the five cases from the Eastern District of Louisiana to which the United States is a party, approximately 94 per cent of the Negro students attended 30 all-Negro schools during the past school year. In four of the school districts 4.5 per cent or less of the Negro students attended traditionally white schools in 1968–1969, and in the fifth district—Iberville—that percentage was less than ten per cent. The proportion of teachers assigned in 1968–1969 to faculties in which their race was a minority ranged from five to eight per cent. No white students have ever

attended traditionally Negro schools in any of these parishes.[3]

In each of these cases the evidence presented to the trial court revealed that there were readily available alternatives to free choice which could be implemented without administrative difficulty and which would result in the prompt and total conversion of the dual school system into a unitary one.

ARGUMENT

1. A school board operating schools once segregated by law is under a constitutional obligation to bring about "[t]he transition to a unitary, nonracial system of public education." *Green* v. *County School Board, supra,* 391 U.S. at 436. They "have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools." *United States* v. *Jefferson County Board of Education, supra,* 380 F. 2d at 389. In approving free choice as a means of reaching this result, the Fifth Circuit Court of Appeals cautioned school boards against confusing the means and the end.

[3] Projections as to what the current school year's statistics were likely to be were before the court of appeals in the form of the *Jefferson* decree reports required to be filed each spring. See 380 F. 2d at 395. The data are compiled in the charts which appear as an appendix to the opinion of the court (Pet. App. C 126–139). The court of appeals stated that analysis of those data led it to conclude that under free choice the situation would not vary "sufficiently that compliance with constitutional standards can be projected" (Pet. App. C 115). See also *id.*, at 121–122.

"Freedom of choice is not a goal in itself. * * * [It] is but one of the tools available to school officials *at this stage* of the process of converting the dual system of separate schools for Negroes and whites into a unitary system." *Id.* at 390.

In *Jefferson* the court warned that the test of any plan was in its results, and that rule became the holding of this Court in *Green* and its companion cases. If the dual system remains and "there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable." 391 U.S. at 441. Accordingly, when these cases were first before the court of appeals in *Adams* v. *Mathews, supra,* they were remanded with directions that the district courts resolve

> (1) whether the school board's existing plan of desegregation is adequate "to convert [the dual system] to a unitary system in which racial discrimination would be eliminated root and branch" and (2) whether the proposed changes will result in a desegregation plan that "promises realistically to work now". * * *

403 F. 2d at 188. Minimum standards for assessing the effectiveness of desegregation plans were set forth for the district's courts' guidance (*ibid.*):

> If in a school district there are still all-Negro schools or only a small fraction of Negroes enrolled in white schools, or no substantial integration of faculties and school activities then, as a matter of law, the existing plan fails to meet constitutional standards as established in *Green.* * * *

The all-Negro school was still a part of each of these 18 school systems and, under the projections for the 1969–1970 school year, would have remained a part of the system, without any prospect of losing its racial identity in the foreseeable future under free choice. In *Green* v. *County School Board, supra,* 391 U.S. at 441, as many as 15 per cent of the Negro students were enrolled in schools traditionally maintained for whites. In each of these 18 cases that percentage had not been achieved by the 1968–1969 school year and it was not anticipated that any district would even achieve that plateau under free choice in the current school year. The faculty desegregation statistics, which resulted from a program of assigning teachers to a school in which their race was in a minority only with their consent, demonstrated that faculties continued to be tailored for heavy concentrations of either black or white students.

The defendants' desegregation plans failed, therefore, in several respects, to meet the standards announced in *Green* v. *County School Board, supra; Raney* v. *Board of Education,* 391 U.S. 443; *Monroe* v. *Board of Commissioners,* 391 U.S. 450; *Bradley* v. *School Board,* 382 U.S. 103, and *Rogers* v. *Paul,* 382 U.S. 198. See also *United States* v. *Montgomery County Board of Education,* 395 U.S. 225.[4]

---

[4] And see *United States* v. *Greenwood Municipal Separate School District,* 406 F. 2d 1086 (C.A. 5), certiorari denied, 395 U.S. 907; *United States* v. *Indianola Municipal Separate School District,* 410 F. 2d 626 (C.A. 5); *Anthony* v. *Marshall County Board of Education,* 409 F. 2d 1287 (C.A. 5).

2. Petitioners advance two basic arguments for granting the writ. First, they contend the decision below is in conflict with Section 407(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000c–6(a)[5] (Pet. 6–9, 52–56), and second, they contend that in view of community opposition (Pet. 20, 32) and the likelihood that whites will refuse at this time to send their children to fully integrated schools (Pet. 37–40), and in view of the educational handicaps which black students bear (Pet. 35–36, 62), the Fifth Circuit moved too quickly and erroneously ordered the abandonment of the free choice plans at this time (Pet. 21–24, 29, 32, 43). We suggest that neither argument is in any way persuasive.

The provision in Section 407(a) of the 1964 Civil Rights Act has no applicability in a situation where the bussing of students is an appropriate and necessary device for eliminating the dual school system—the legacy of active school board discrimination. Thus, the Seventh Circuit Court of Appeals has held that Section 407(a) has no application where the transportation of students is necessary, not "to achieve racial balance, although that may be a result,

[5] The statutory provision reads, in pertinent part, as follows: "* * * [N]othing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. * * *"

but to counteract the legacy left by the [School] Board's history of discrimination." *United States* v. *School District 151 of Cook County, Illinois,* 400 F. 2d 1125, 1130, affirming 286 F. Supp. 786, 799 (N.D. Ill.) Accord, *United States* v. *Jefferson County Board of Education,* 372 F. 2d 836, 880 (C.A. 5); *Keyes* v. *School District Number One, Denver, Colorado,* C.A. No. C–1499, decided August 14, 1969, order stayed August 27, 1969, No. 432–69 (C.A. 10), stay vacated, August 29, 1969 (Mr. Justice Brennan). As District Judge Doyle observed in the *Denver* case, *supra,* "It would be inconsistent to construe the proviso as a limitation on the power of the courts to correct a deprivation of rights which Section 407(a) itself is intended to remedy."

This Court has consistently rejected arguments seeking a delay of judicial vindication of the constitutional rights here at stake based on community hostility and the potentiality of "white flight." *Brown* v. *Board of Education,* 349 U.S. 294, 300; *Cooper* v. *Aaron,* 358 U.S. 1; *Monroe* v. *Board of Commissioners, supra,* 391 U.S. at 459; *Keyes* v. *School District Number One, Denver, Colo., supra,* slip opinion p. 3. And, surely, petitioners may not profit from their failure to comply even with *Plessy* v. *Ferguson,* 163 U.S. 537. Cf. *Gaston County* v. *United States,* 395 U.S. 285.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1969.

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No. 466

In the Supreme Court of the United States

OCTOBER TERM, 1969

ST. HELENA PARISH SCHOOL BOARD, ET AL,
Petitioners,

v.

LAWRENCE HALL, ET AL.

On Application for Writ of Certiorari to the United States Court of Appeal, Fifth Circuit

[redacted] **OF THE STATE OF LOUISIANA AS AMICUS CURIAE**

JOHN J. McKEITHEN,
Governor of the State of Louisiana.

C. C. AYCOCK,
Lieutenant Governor of the State of Louisiana.

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

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No. 466

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LAWRENCE HALL, ET AL,

On Application for Writ of Certiorari to the United States Court of Appeal, Fifth Circuit

MOTION OF THE STATE OF LOUISIANA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Louisiana respectfully moves that its brief as amicus curiae be filed forthwith without formal leave of the Court or in the alternative moves the Court for formal leave of Court to file its brief as amicus curiae, on the following grounds:

1.

Pursuant to Section 4 of Rule 42 of the Rules of the Supreme Court of the United States, the State of Louisiana files its brief in this case as amicus curiae under the sponsorship of the Attorney General of the State of Louisiana as evidenced by his certificate appended hereto.

2.

Section 4 of Rule 42 dispenses with the necessity of obtaining consent of the parties for the filing of the brief of an amicus curiae when the amicus curiae is a state sponsored by its attorney general. As leave of Court seems to be required only when the consent of parties is required and refused, it appears that the State of Louisiana may file its brief as amicus curiae without obtaining formal leave of Court to do so.

3.

However, if the State of Louisiana has mistaken the meaning of the rules, leave to file the brief is requested and in support thereof Louisiana shows the following:

a. Louisiana requires school attendance by its children pursuant to R.S. 17:221 and provides free transportation pursuant to R.S. 17:158, and that while this present case involves only 42 of the 64 parishes of the State and 2 municipalities, all of the school districts of the State and the educational program of the State as a whole necessarily will be affected by the outcome of this case.

b. The case involves a principle vital to the State as a whole which is whether there can be lawfully imposed upon the people of some states as distinguished from others or upon all states a quota system designed by the court wholly on the basis of color or race for the composition of the student body and teaching faculty of public schools, and to effectuate such quota system to require extensive transportation of students by the

State or its agencies. These issues are applicable to the state as a whole more directly than to the several school boards and hence the State of Louisiana urges the Court to consider this brief amicus curiae supporting the application for writs of certiorari in this cause.

Respectfully submitted,

JOHN J. McKEITHEN,
Governor of the State of Louisiana

C. C. AYCOCK,
Lieutenant Governor of the State of Louisiana

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.
Sponsor

VICTOR A. SACHSE, Counsel

FRANK P. SIMONEAUX, Counsel

CERTIFICATE

I, Jack P. F. Gremillion, Attorney General of the State of Louisiana, sponsor the motion by the State of Louisiana to file a brief amicus curiae and such brief in support of the application for writ of certiorari in this matter, which I do pursuant to Rule 42 of the Supreme Court of the United States.

Baton Rouge, Louisiana, this 8th day of October, 1969.

JACK P. F. GREMILLION
Attorney General,
State of Louisiana.

No. 466

In the Supreme Court of the United States

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ST. HELENA PARISH SCHOOL BOARD, ET AL,
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On Application for Writ of Certiorari to the United States Court of Appeal, Fifth Circuit

BRIEF OF THE STATE OF LOUISIANA AS AMICUS CURIAE

* * *

May it Please the Court:

INTEREST OF THE STATE OF LOUISIANA AS AMICUS CURIAE

The interest of the State of Louisiana as amicus curiae is set forth in paragraph three of its Motion For Leave To File Brief As Amicus Curiae.

ARGUMENT

The Fifth Circuit in the current case seems to say in effect that to satisfy the decisions of this Court it must require the school boards of the State of Louisiana to establish a quota system based wholly upon considerations of race in the composition of student body and faculty. This Court found objectionable and unconstitutional a dual system of public schools based upon

race and we think it should hold such a predicate objectionable and unconstitutional here.

The State of Louisiana by reason of the Constitution, particularly Article IV, Section 3, is on an equal footing with the other states, with the right to enjoy the same measure of local or self-government as the other states in this Union. The present position of the United States Court of Appeal for the Fifth Circuit seems to be in flagrant contradiction of this fundamental right as it treats the State of Louisiana as once again as something less than a full member of the Union as though it were again within a period of reconstruction.

In *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294, 300, 301, 73 S. Ct. 753, 756, this Court said:

> "[T]he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units *to achieve a system of determining admission to the public schools on a nonracial basis*, and revision of local laws and regulations which may be necessary in solving the foregoing problems." (Underscoring ours)

In *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430, 432, 88 S. Ct. 1689, 1691, Justice Brennan related the quoted statement from *Brown* to the question as to whether "adoption of a 'freedom of choice' plan which allows a pupil to

choose his own school constitutes adequate compliance with the Board's responsibility *** ".

The Court found objectionable and unconstitutional a dual system of public schools based upon race. We refer to *Downs v. Board of Education*, 336 F. 2d 988 (1964), Tenth Circuit. The complaint was de facto segregation in Kansas City schools. The Court noted that the school system operates on what is known as the neighborhood school policy. That Court did not read into the *Brown* decision as much as Justice Brennan did in the *Green* case. The Court said:

> "The neighborhood school system and other school systems, by which admission to the school is determined upon the basis of similar criteria such as residence and aptitude, are in use in many parts of the country. They have been successfully challenged on constitutional grounds where operated in such a way as to discriminate against students because of their race or color." (Page 995)

The Circuit Court further noted:

> "There is, to be sure, a racial imbalance in the public schools of Kansas City ***."

And the Court gave the figures. The Court further said:

> "*** Of course, we agree with the appellants that the school authorities cannot, under applicable constitutional standards heretofore discussed, use such a change in boundary lines or the neighborhood school system as a guise for the purpose of perpetuating racial segregation. The trouble is that there is no evidence to show that the boundary line was changed for that purpose.*** " (Page 996)

The Court further said:

> "Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them. *** " (Page 998)
>
> "Moreover, the question was conclusively answered in Bell v. School City of Gary, Indiana, 7 Cir., 324 F. 2d 209, 213, cert. denied, 377 U. S. 924, 84 S. Ct. 1223, 12 L. Ed. 216, where the court held that '*** "There is no affirmative U. S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils." ' " (Page 998)

In *Tina Deal et al v. The Cincinnati Board of Education*, 369 F.2d. 55, 58; certiorari denied 389 U. S. 847, 88 S. Ct. 39, still another Circuit Court of the United States dealt with this issue. The Ohio school system was based on the so-called neighborhood plan. The Court said:

> "Appellants contend that the maintenance of a public school system in which racial imbalance

> exists is a violation of their constitutional right to the equal protection of the law. They assert that because the Negro student population is not spread uniformly throughout the Cincinnati school system, without showing a deliberate discrimination or even racial classification, there is a duty of constitutional dimensions imposed on the school officials to eliminate the imbalance."

That court thought that:

> "The essence of the *Brown* decision was that the Fourteenth Amendment does not allow the state to classify its citizens differently solely because of their race."

While we recognize that the abandonment of a dual school system based on color is intended to result in a school system not based on color or race, it seems to us as it seemed to that Court that a quota system based on race violates the Constitution of the United States.

John Kaplan, then Associate Professor of Law, Stanford University, writing on this general subject, discussed percentage integration as defined in Bell v. School City of Gary, Indiana, 324 F2d 209, cert. denied, 377 U.S. 924. The plaintiffs there insisted that the variation be neither more than one third above nor more than one third below the percentage of Negroes in the community at large. He considered also the Urban League definition that a school must be considered a Negro school if 60 percent of the children are of that race. He said, "Although each of the definitions may in some pragmatic way have a value, it is hard to imagine that a court might say that one or the other was incorporated into the United States Constitution under the

general purposes and framework of the fourteenth amendment." Vol. 58, Northwestern University Law Review, p. 157, 181.

Affirmative action required by a state might well include the designation of areas which a public school will primarily serve, and the drawing of lines encompassing such areas in such a manner as to include residents of both races to the extent that the school can reasonably serve such an area. Affirmative action might well also include the assignment of teachers to schools without regard to race or color with the *result* that faculty and student body will include Americans of both colors. But, action which means that a fixed proportion of children of the two races and a fixed proportion of teachers of the two races must make up the composition of the various public schools will force continuing concentration of thought upon the matter of race and color and will inject into American life a racial quota system which can be expected to pervade our whole economic world.

In the *Deal* case the court said:

> "In the present case, the only limit on individual choice in education imposed by state action is the use of the neighborhood school plan. Can it be said that this limitation shares the arbitrary, invidious characteristics of a racially restrictive system? We think not. In this situation, while a particular child may be attending a school composed exclusively of Negro pupils, he and his parents know that he has the choice of attending a mixed school if they so desire, and they can move into the neighborhood district of such a school. This situa-

> tion is far removed from *Brown*, where the Negro was condemned to separation, no matter what he as an individual might be or do. Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school, prejudice. We read *Brown* as prohibiting only enforced segregation."

In Louisiana this choice may be exercised without moving into the neighborhood of another school. If *Brown* is read as not only prohibiting enforcing segregation but as commanding affirmative steps to produce integration, the Court is urged to refrain from permitting the subordinate federal courts to force children to attend a school far from their own neighborhoods and against the wishes of their parents. For this, it seems to us, means the death of not just freedom-of-choice, which this court has said was only a means to an end, but the death of freedom itself. If the principle of quota based on race and color is not rejected as to the schools, we must expect that all public and private works hereafter must be constructed by corps of craftsmen and laborers chosen on a quota system based upon color. So also for every phase of the 65 million or more people employed in the affairs of this nation: its police force; its army; its navy; until everyone in this country is forced to think of color first and to be required to engage in pursuits whether he wants to or not because the court thinks that is the way to achieve a satisfactory racial balance. Once we engage upon a quota system based upon color, we must determine the basis for

determining the quota; whether by school district; whether by state; whether by nation, and when this is carried forward into our other activities involving the greater portion of the adult portion of our country the complications are immense.

Our country has gone through a long effort to rid itself of a quota system based on national origin as concerns immigration. The Act of May 26, 1924 (c. 190, 43 Stat. 153) was bitterly resented by vast numbers of our people and the Act of October 3, 1965 [1] (§ 1, 79 Stat. 911, Pub. L. 89-236) was largely aimed at ameliorating the ill will that an immigration law based upon quota related to the national origin of our population of earlier years engendered.

As concerns schools, a determination to base their composition upon race and color will necessarily involve transportation of students from their home neighborhoods to other neighborhoods.

The transportation of children from the neighborhood of their homes to distant schools when other sufficient schools are nearby and only for the purpose of achieving a racial balance in the schools is objectionable to many people of both races throughout our nation. It is objectionable to many parents who decry the excessive exposure of their children to the hazards of traffic and who decry the longer absence from their

---

[1] "(a) No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place or residence, except as specifically provided in sections 1101(a) (27), 1151(b), and 1153 of this title:"

homes necessary to accomplish this excessive transportation. It is objectionable to boards of education because of the extra expenses imposed upon them in the operation of motor vehicles and, in some instances, extra investment in motor vehicles. We do not believe that this point has been passed upon by this Court but it has received attention by other courts.

We refer once more to *Deal* where the court said:

> "We hold that there is no constitutional duty on the part of the Board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance that it did not cause, nor is there a like duty to select new school sites solely in furtherance of such a purpose.
>
> "The bussing of pupils away from the neighborhoods of their residences may create many special problems for boards of education. These include the providing of adequate transportation and proper facilities and personnel for the supervision, education and well being of *all* pupils. All of this must be accomplished within the Board's budget."

We ask this Court to reject a quota system based upon race. In another area of the law, Dean Rusk, when Secretary of State, said:

> "As long as our immigration law classifies persons according to national and ancestral origins, we cannot convince our critics that we judge each other on the basis of ability, industry, intelligence, integrity, and such other factors as determine a man's value to our society. On the contrary,

the continuance of the national origins system suggest that we think less well of those citizens of the United States who are descended from certain ethnic origins than we do of others, and—so the logic goes—for that reason we are reluctant to receive more from certain countries." [2]

From Senate Report No. 748, Conference Report No. 1101, September 29, 1965:

"The bill H.R. 2580, as amended, does not embody a comprehensive revision of the Immigration and Nationality Act, *but has as its primary objective the abolishment of the national origins quota system for the allocation of immigrant visas . . .*"

* * *

"The witnesses included congressional sponsors of the proposed legislation, Cabinet officers, Government officials, representatives of religious, patriotic, nationality, veterans, labor, and other nongovernmental organizations as well as from individual members of the public. The positions of both the proponents and opponents of change in the existing law were presented to the subcommittee in depth.

"The committee, after consideration of all the information before it and after its detailed study of the recommendations of the President and the strong representations made by the concerned executive departments, has concluded that the national origins provisions of the Immigration

[2] SubCommittee on Immigration and Naturalization of the Committee on the Judiciary, U. S. Senate, Feb. 24, 1965 in the course of hearings on 5.500, an administration sponsored proposal to amend the U.S. immigration laws. *Congressional Digest*, May, 1965, p. 142.

and Nationality Act should be removed from the law and a highly selective system for the admission of immigrants as contained in the bill H.R. 2580, as amended, be adopted."

Let it be said that following a long pattern of the history of our nation racial distinctions were made. Let it be acknowledged that some of the states of this great Union continued to cling to this pattern under the approval of this Court (*Plessy v. Ferguson*, 163 U.S. 537) until the Brown decision. Let it be said that the decision was not welcomed in all quarters. It must yet be said that Louisiana has conformed to the direction of the United States Court for the Fifth Circuit in Jefferson. *United States of America v. Jefferson County Board of Education, et al*, 372 F. 2d. 836, corrected and affirmed en banc 380 F. 2d. 385, cert. den. 389 U.S. 840. That many Negro parents have not chosen to send their children to schools formerly attended only by white children, that no white parents have chosen to send their children to schools formerly attended only by Negro children does not make these schools either black or white. In obedience to the dictates of this Court no such schools exist in Louisiana by law. If then, their composition does not reflect the proportionate population of nation or of state, or of school district, this is the result of freedom in our great nation. Louisiana, for itself and for all Americans asks this Court not to bid freedom farewell.

For which reasons, the State of Louisiana respectfully supports the application for writs.

Respectfully submitted,

JOHN J. McKEITHEN,
Governor of the State of Louisiana

C. C. AYCOCK,
Lieutenant Governor of the State of Louisiana

by
JACK P. F. GREMILLION,
Attorney General
State of Louisiana.
Sponsor.

VICTOR A. SACHSE, Counsel

FRANK P. SIMONEAUX, Counsel

PROOF OF SERVICE BY MEMBER OF SUPREME COURT BAR PURSUANT TO RULE 33(3)

I, Jack P. F. Gremillion, Attorney General of the State of Louisiana, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 8th day of October, 1969, I served copies of the foregoing Motion of the State of Louisiana To File Brief as Amicus Curiae and The Brief Amicus Curiae on the several parties thereto, as follows:

1. On the United States by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C. 20530; to Jerris Leonard, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; to Merle W. Loper, Joseph Ray Terry, Jr. and Hugh W. Fleischer, Department of Justice, Washington, D. C. 20530; and to Patrick Hardin, Department of Justice, New Orleans, Louisiana.

2. On the Various Named Plaintiffs, by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to Collins, Douglas & Elie, 344 Camp Street, New Orleans, Louisiana; Richard B. Sobol, George M. Strickler, Jr., Robert P. Roberts, 606 Common Street, New Orleans, Louisiana; Jack Greenberg, Norman C. Amaker, William Bennett Turner, Norman Chachkin, 10 Columbus Circle, New York, New York 10019; and A. P. Tureaud, 1821 Orleans Avenue, New Orleans, Louisiana.

3. On the various named schools boards, petitioners herein, by mailing copies in duly addressed envel-

opes, with first class postage prepaid, to their attorney of record, John F. Ward, Esq., 206 Louisiana Avenue, Baton Rouge, Louisiana.

JACK P. F. GREMILLION,
Attorney General of the State
of Louisiana,
State Capitol Building,
Baton Rouge, Louisiana.